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# THE COMMON LAW OF ENGLAND.

# THE COMMON LAW OF ENGLAND,

BEING THE TENTH EDITION OF BROOM'S COMMENTARIES ON THE COMMON LAW.

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# VOL. II.

## BOOK IV.

### CONTRACTS.

### Chapter I.

### INTRODUCTORY.

We have so far dealt only with those obligations which a man incurs when he commits a wrongful act or omits to do his duty. We now propose to treat of those obligations which persons incur by voluntarily entering into contracts.

The first step towards a contract is the compact or bargain. The two essential elements of a compact or bargain are—

(i.) that both parties should mean, and agree to, the same thing;

(ii.) that each should, by word or conduct, inform the other that he or she does so agree.

But this compact or bargain does not (or does not necessarily) create any obligation. Without something more it is as a rule no contract. A contract is such a compact or bargain as the State will enforce. And the State will not as a rule enforce a bargain without some additional formalities or conditions. In some cases the State requires that the terms of the bargain should be stated in writing,[1] or that the document should be stamped or registered, or that there should be some consideration for the promise. The State requires these additional formalities for two reasons:—

(i.) To distinguish the concluded bargain from the preliminary negotiation;

(ii.) To preserve a clear record of the transaction.

If these formalities are absent, the State will not enforce

[1] See Chap. IV., *post*.

the bargain, which is then no contract, but only a *nudum pactum*. In England as a rule the State requires either that the contract should be under seal or that the person, on whom the burden of the contract will rest, should receive some valuable consideration.

Contract is founded on consent. It is of the essence of every contract that the parties to be bound thereby should consent, expressly or impliedly, to whatever is stipulated therein: for otherwise no obligation or reciprocal right can be created between them.[1] Consent involves in contemplation of law the existence of a physical and moral power of assenting, as well as a deliberate and free exercise of such power. Hence the absence of any of these capacities in either of the parties to a contract renders him incapable of binding himself thereby.

A contract imposes no obligation upon parties, unless it be a contract recognised as valid by the law. The State interferes to prohibit the making of certain kinds of contracts, or to annul them if made. Generally speaking, the rule is that people may contract as they please. "But occasionally there occur in the course of experience cases in which it is found desirable to depart from that general principle—cases of particular inconvenience in particular trades or employments, and with reference to particular classes:[2] for instance, in the case of seamen, whose contracts are the subject of special legislative provision," which has been made with the object of "affording protection to a class of persons not very well able to protect themselves."[3]

Even where the legislature does not expressly interfere to prohibit contracts, acknowledged principles of law may operate in such a manner as materially to vary or qualify them. For instance, even if a mortgagor expressly covenants that the mortgagee shall have the land mortgaged absolutely, if the debt be not paid at the time stipulated, yet the rules of equity will declare that the mortgagee's title shall not be absolute, but that the estate shall be redeemable, although the mortgage debt be, in

[1] *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 775; *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459.

[2] See the Truck Act, 1831 (1 & 2 Will. IV. c. 37, amended by 50 & 51 Vict. c. 46); and Chap. XII., Master and Servant, *post*.

[3] *Per* Maule, J., in *Sharman* v. *Sanders* (1853), 13 C. B. at p. 176.

fact, not repaid at the time appointed. So, if a man, in consideration of an immediate loan of £50, binds himself in a penalty of £100 to repay the £50 within a year, and makes default, the law requires him to pay only the £50 with reasonable interest. In each of these cases the law assumes to regulate, and may to some extent overrule, the contract into which the parties have entered. It may be added that the Courts will not attach legal consequences to mere social agreements, such as arise out of offers of hospitality, or to words obviously spoken in jest.

Again, the State will not enforce a contract obtained by fraud, violence or undue influence, or any illegal or immoral contract, or any contract which it deems contrary to public policy (such as a betting or wagering contract, or a contract by an occupier of land that he will not avail himself of the provisions of the Ground Game Act, 1880). The State also refuses to enforce an unfair bargain made with an expectant heir.[1]

Moreover, the State regards certain classes of persons as wholly or partly unable to contract.[2] Some persons may be temporarily disabled by lunacy or excessive drunkenness. It has been already stated at the commencement of this chapter that there cannot be a contract unless the minds of both the contracting parties are agreed on the same thing; and in the case of lunacy or excessive drunkenness, the mind of one party is incapable of forming an agreement. This, however, does not of itself render the contract unenforceable. Let us assume that a lunatic orders goods which he desires to possess, and for which he is willing to pay. The tradesman from whom he orders these goods is perfectly willing to sell them to him at the price named; their two minds therefore are at one. The law will enforce this contract against the lunatic or his estate unless it can be shown that the tradesman knew that the defendant was insane at the time when he ordered the goods; it is not enough for the defendant or his representatives to prove that he was in fact insane at the date of the contract.[3] If, however, a tradesman supplies a lunatic with "necessaries,"[4] he can recover their value. So,

[1] See Chaps. V. and VI., *post*.
[2] See Book VI., The Law of Persons.
[3] *Beavan* v. *M'Donnell* (1854), 10 Exch. 184.
[4] As to what are necessaries, see *post*, Book VI., Chap, II., Infants.

too, a contract made with a drunken man will be enforced, unless at the time of making the contract he was obviously so drunk as to be incapable of dealing with any matter of business. Again, under the common law, most contracts of a corporation are not binding unless made under seal; for "the seal is the only authentic evidence of what the corporation has done or agreed to do."[1] But this principle has certain qualifications.[2]

So, too, a contract made by an infant cannot be enforced against him, unless the Court be satisfied that the contract was for the benefit of the infant. Thus an infant can be sued upon any contract which he has made for the purchase of "necessaries," but not of any other goods.[3] A defendant, who has pleaded infancy, need not show that the plaintiff knew that he was an infant or in any way took advantage of his youth or inexperience. And although, as a rule, all contracts must be mutual, an infant can always sue upon a contract made with him in proper form, whether he himself could be sued on it or not. Moreover, no action can be brought upon a promise made after full age to pay a debt contracted during infancy, or upon a ratification made after full age of a promise or contract made during infancy, whether there was or was not any new consideration for such promise or ratification made after full age.[4] There are, however, certain contracts of which ratification by an infant will be implied, unless he repudiates them before or within a reasonable time after he attains his majority.

At common law a married woman could not contract with her husband, nor with anyone else except as agent for her husband. But this absurdity has been remedied by the various Married Women's Property Acts;[5] and now any woman married since 1882 can possess separate property over which her husband has no control, and may contract so as to bind such separate property. So can a woman married before

[1] *Per cur.* in *Mayor of Ludlow* v. *Charlton* (1840), 6 M. & W. at p. 823.
[2] See *post*, pp. 664—666.
[3] Infants Relief Act, 1874 (37 & 38 Vict. c. 62), s. 1.
[4] *Ib.*, s. 2.
[5] 33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50; 45 & 46 Vict. c. 75; 56 & 57 Vict. c. 63.

1883, in respect of property the title to which has vested in her since 1882. She can sue and be sued on such contracts as though she were a single woman. Indeed, if the contract be made since December 5th, 1893, it is wholly immaterial whether at the date of the contract she had any separate property or not. Should an action be successfully brought against her for damages for breach of contract, the judgment against her can be enforced against any separate property of which she is possessed at the date of judgment. At the same time her husband remains liable as at common law for any contract which she makes as his agent under any authority from him express or implied.

Again, the State will not enforce certain contracts made by or with special classes of persons. Thus, on grounds of public policy an alien enemy will not be allowed to sue in our Courts on any contract which he has made, unless he has obtained special licence so to do from the Crown. A convicted felon cannot bring an action or make a valid contract while he is undergoing his sentence; but he can do so when he is out on "ticket of leave." The administrator of a convict's property, however, has "absolute power to let, mortgage, sell, convey or transfer any part of such property as to him shall seem fit."[1] The rulers and accredited representatives of foreign states are outside the jurisdiction of English Courts. Unless they consent to submit themselves to it, they cannot be sued here.[2]

A barrister cannot sue to recover a fee for professional services; for it is an *honorarium*. So, too, at common law the professional services of a physician raised no implied contract to pay for them. But since 1858[3] such a contract is implied. The by-laws of the Royal College of Physicians, however, prohibit the Fellows of this body from taking advantage of this provision.

A contract may be put an end to by performance, or by

[1] Forfeiture Act, 1870 (33 & 34 Vict. c. 23), s. 12; and see *Carr* v. *Anderson*, [1903] 1 Ch. 90.

[2] *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149; and see *Imperial Japanese Government* v. *P. & O. Navigation Co.*, [1895] A. C. 644; *South African Republic* v. *La Compagnie, &c.*, [1897] 2 Ch. 487; [1898] 1 Ch. 190.

[3] See 21 & 22 Vict. c. 90, s. 32; and 49 & 50 Vict. c. 48, s. 6.

a new contract, or by simple rescission, or release. The right to sue on a contract may be barred by lapse of time or by the bankruptcy of the person liable.

*Classification of Contracts.*

Contracts may be classified in many different ways. First as to form. A few contracts, such as recognizances,[1] are "contracts of record." Others are under seal; these are called "specialty" contracts. The great majority of contracts are "simple contracts," *i.e.*, not "of record" or under seal. These may be made in writing, or by parol, or by implication of law from the conduct of the parties. All simple contracts require some consideration to support them.[2]

Again, most contracts are express—though many are implied. All implied contracts are simple contracts. An express contract is one, the terms of which are, at the time of making it, written down or declared in so many words. It may be of record, or by deed, or in writing, or by word of mouth. An implied contract, on the other hand, is one which reason and justice dictate, and which the law, therefore, presumes that the parties intended, although they have not actually so stated. The law does this to complete the contract between the parties and to "prevent such a failure of consideration as cannot have been within the contemplation of either side."[3] In such a contract the law implies the obligations of the parties from their previous acts; whereas in an express contract the parties themselves determine the obligations which shall fall on each respectively. Sometimes, however, the law will imply additional terms in an express contract; for the parties do not write down the whole of their bargain: they leave customary incidents to be incorporated by implication.[4] But the law will not vary or introduce new terms into an existing agreement; it will

[1] See *ante*, p. 179.
[2] See *post*, pp. 680—683.
[3] *Per* Bowen, L. J., in *The Moorcock* (1889), 14 P. D. at p. 68; quoted by Lord Esher, M. R., in *Hamlyn* v. *Wood*, [1891] 2 Q. B. at p. 492.
[4] See, for instance, *ante*, pp. 78, 83.

merely declare that particular acts, unaccompanied or unexplained by express stipulations, give rise to particular duties or liabilities; and it will then proceed as if the parties had stipulated for their performance.

Thus, if A. employs B. to do some business or to perform some work for him without any agreement as to B.'s remuneration, the law implies that A. has undertaken to pay him as much as his labour deserves; and a reasonable amount may be recovered from A. just as surely as if A. had entered into a written agreement to that effect. If A. desired that the work in question should have been done for a fixed sum, he ought to have had an express agreement specifying this, and so limiting and defining his liability. Again, if C. by a written agreement employs D. as his agent in a certain transaction, the law will imply an undertaking by C. to indemnify D. against all losses, damages and expenses properly incurred by him in the transaction; this undertaking need not be set out in the written agreement.[1]

Where one man avails himself of the benefit of services done for him by another, although without his express authority or request, the law dispenses with any formal words of contract, and presumes him to have promised an adequate compensation.[2] So, where a person buys an article without stipulating for the price, he is presumed to have undertaken to pay its market value or what it is fairly worth.[3] On the other hand, where plans and a specification for the execution of a certain work are prepared for the use of those who are asked to tender for its execution, the person asking for the tenders does not enter into any implied warranty that the work can be successfully executed according to such plans and specification.[4]

### *Joint and Several Contracts.*

When there are two or more persons on one side of a contract, the question arises whether their liability is joint, or several, or joint and several. This is a question which turns primarily on the language of the contract itself. Still, it is a question of the intention of the parties, and the judge will not confine his attention to their words; he will also have regard to all the surrounding circumstances, to the respective interests of the parties, and to their conduct.[5] Thus a contract made by the executors of a will, the trustees of a settlement or the partners in a firm, with

[1] See *Dugdale* v. *Lovering* (1875), L. R. 10 C. P. 196, 201.
[2] *In re English and Colonial Produce Co.*, [1906] 2 Ch. 435.
[3] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 8 (2); and see *post*, p. 786.
[4] *Thorn* v. *Mayor, &c., of London* (1876), 1 App. Cas. 120, 128.
[5] *Read* v. *Price*, [1909] 1 K. B. 577.

reference to the testator's estate, to the trust fund or to the business of the firm respectively, will generally be construed a joint and not a several contract, unless there is something in the language of the contract which forbids this construction. The distinction is one of considerable importance; as, on the death of one joint contractor, his rights or liabilities pass to the survivors and not to his personal representatives. Moreover, a judgment against one joint contractor, even though unsatisfied, is a bar to any action against the others; and a release given to one joint contractor releases all.

A contract, as a rule, confers on the parties to it merely a *jus in personam*---a right to recover damages or obtain other relief, in case the contract be broken. But in some cases it also confers a real right. Thus, as soon as a contract for the sale of ascertained existing goods is legally completed, the property in them passes to the purchaser. So a lease or other agreement for a tenancy, if sufficient in law, confers on the tenant a right to the exclusive possession of the premises, as soon as he has entered upon them.

In the following chapters we shall deal more fully with the various classes of contracts which occur in daily life :—

(i.) Contracts of record.

(ii.) Contracts under seal.

(iii.) Simple contracts, whether written, oral or implied.

(iv.) Void, voidable and illegal contracts.

## Chapter II.

### CONTRACTS OF RECORD AND UNDER SEAL.

A RECORD is a memorial of some legal proceeding which has been written on parchment and enrolled in the proper office. The only contract of record met with in modern times is a recognizance. By a recognizance a prosecutor or a witness in a criminal case is bound over to appear at the trial; or a person after conviction binds himself to appear and receive judgment at some later time if called upon, and in the meantime to keep the peace or to be of good behaviour, &c.[1] A contract of record proves itself; no further evidence is necessary. It can be enforced by a writ of *scire facias*.

Judgments of Courts of record are also sometimes spoken of as contracts of record.[2] They are, however, not contracts, for they are not necessarily founded on agreement; the defendant, as a rule, is most unwilling to have judgment pronounced against him. A judgment is an act of the Court, which imposes on one party an obligation to do something, *e.g.*, to pay money to another, &c. This is an obligation "of record"; for it derives its binding effect from the fact that it is recorded on the rolls of the Court and can only be proved by the record or an official copy of it.

A judgment, even if it be a judgment by consent or default,[3] has the following effect:—

(i.) The original contract "merges in," or is extinguished by the judgment. Even where the original cause of action was on a bond or deed, the debt thus due becomes "by judicial proceeding and act in law . . . transformed and metamorphosed

[1] See *post*, Book V., Chap. VI.

[2] As to foreign judgments, see *post*, Chap. XVI.

[3] *In re South American and Mexican Co., Ex parte Bank of England*, [1895] 1 Ch. 37. As to the effect of a judgment in an action in which the Court had no jurisdiction, see *Joint Committee of River Ribble* v. *Croston U. D. C.*, [1897] 1 Q. B. 251. As to setting aside the judgment, see *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; *Law* v. *Law*, [1905] 1 Ch. 140.

into a matter of record,"[1] and it is upon the judgment only, so long as it remains in force and unreversed, that the plaintiff can sue.

(ii.) A judgment binds the land of the judgment debtor, but not until it is taken in execution.[2]

(iii.) Further, a judgment works an estoppel, *i.e.*, it is final as between the parties to it: the same matter cannot again be litigated between the same parties, for it is *res judicata*. But a judgment cannot be used to estop one who is neither a party nor privy to it, who has had no opportunity to cross-examine the witnesses called upon the trial or to dispute the conclusions drawn from the evidence there offered.[3]

A judgment may, however, be impeached, if the judge who tried the case was disqualified by reason of pecuniary interest in the subject-matter before the Court, or if the judgment was obtained by fraud. "Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal."[4] On proof of such fraud the Court can and will set aside its own judgment;[5] but until so set aside, it effects an estoppel.

"If there be a breach of contract or wrong done, or any other cause of action by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained, so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of obtaining the same result . . . The cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. . . . This applies equally where there is but one cause of action, whether it be against a single person or many. The judgment of a Court of record changes the nature of that cause of action, and prevents its being the subject of another suit, and then the cause of action, being single, cannot afterwards be divided into two."[6] Thus a judgment against one of two joint debtors is a bar to an action against the other, even though it

[1] *Higgens's Case* (1606), 6 Rep. 45.
[2] 27 & 28 Vict. c. 112. As to registration, see 51 & 52 Vict. c. 51.
[3] *Concha* v. *Concha* (1886), 11 App. Cas. 541.
[4] *Per cur.* in *The Duchess of Kingston's Case* (1776), 2 Smith's L. C., 11th ed. at p. 738. See *Cole* v. *Langford*, [1898] 2 Q. B. 36; *Birch* v. *Birch*, [1902] P. 130. The rule applies to a judgment by default: *Wyatt* v. *Palmer*, [1899] 2 Q. B. 106.
[5] See the remarks of Lord Denman, C. J., in *Philipson* v. *Earl of Egremont* (1844), 6 Q. B. at p. 605.
[6] *Per cur.* in *King* v. *Hoare* (1844), 13 M. & W. at p. 504.

remains unsatisfied by the original defendant.[1] This bar is not removed, even if the joint contractor, against whom judgment has been recovered, consents to the judgment being set aside.[2] In an action, however, against one of several joint contractors, a defence by way of estoppel of judgment obtained by another co-contractor must show that the former action was successfully resisted on some ground available in common to all the joint contractors. Further, for a defence by way of estoppel of judgment to succeed, the cause of action to which it is pleaded must be the same as that in respect of which the judgment was recovered—*e.g.*, an unsatisfied judgment against one joint contractor on a cheque given by him alone for the joint debt is not a bar to an action against the other joint contractor on the original contract.[3]

A contract under seal is a contract in writing, the execution of which is accompanied by certain formalities, which not merely indicate the assent of the contracting parties, but give to their contract a greater solemnity and, therefore, peculiar force and efficacy. A contract under seal is often called a "specialty contract"; but a specialty may also be constituted by statute, and if so, is a contract of the highest kind.

Any instrument under seal, which is made between private persons, is called a deed. It may be unilateral (made by one party only) or it may be bilateral (made between two or more parties). At common law the right of action upon a deed of the latter kind is restricted to those who are parties to it or persons who claim under them.

A deed is distinguished from a simple contract in writing by the formalities of sealing and delivery.

Prior to the Statute of Frauds, signing was not essential to a deed which had been executed by sealing and delivery. Even now, the absence of the signature of a party to a deed, the subject-matter of which comes within the operation of that statute, would seem to be immaterial, for the object of that enactment was "to prevent matters of importance from resting on the frail testimony of memory alone." It was not intended to apply to instruments already authenticated by a ceremony of a higher nature than a signature or mark.[4]

Delivery is essential to the due execution of a deed.[5] If executed after

[1] *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547.
[2] *Hammond* v. *Schofield*, [1891] 1 Q. B. 453.
[3] *Wegg Prosser* v. *Evans*, [1895] 1 Q. B. 108.
[4] *Per* Rolfe, B., in *Cherry* v. *Heming* (1844), 4 Exch. 636, 637.
[5] Delivery is not necessary in the case of a body corporate, for the fixing their common seal to the deed is tantamount to a delivery. See *Xenos* v. *Wickham* (1866) L. R. 2 H. L. 296.

the day on which it purports to bear date, it takes effect from the day of delivery and not from the day of the date.[1]

The usual practice in delivering a deed is to place the finger upon the seal or wafer and to repeat the formula, "I deliver this as my act and deed." But delivery without words is sufficient, and a deed may be delivered by words without any act of delivery.

If a deed which has been formally sealed and delivered is retained by the party executing it, such retention will not *per se* affect the operation of the deed. "The efficacy of a deed depends on its being sealed and delivered by the maker of it, not on his ceasing to retain possession of it."[2] Delivery to a third person for the use of the party in whose favour the deed is made, provided the grantor parts with all control over the instrument, will make the deed effectual from the instant of such delivery; for the law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit.

A deed may be delivered as an escrow, *i.e.*, it may be delivered to a stranger to be kept by him until certain specified conditions be performed, and then to be delivered to the other party to the deed.[3] If in fact the deed is so delivered to a stranger, it will not take effect as a deed until the condition be performed, although the delivery is in form absolute. But, under the common law at all events, if a deed was executed and delivered by the one party to the other, it could not operate as an escrow. Such a delivery was absolute. There cannot be a partial execution or delivery of a deed.[4]

It was a clear rule of the common law that contracts by corporations must be made under the seal of the corporation or by a person authorised under seal, or must be ratified by seal.[5] "The seal is the only authentic evidence of what the corporation has done, or agreed to do. . . . Either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation."[6]

Numerous exceptions have been engrafted on this rule;

[1] See *Powell* v. *London and Provincial Bank*, [1893] 2 Ch. 555.

[2] *Per* Lord Cranworth in *Xenos* v. *Wickham* (1866), L. R. 2 H. L. at p. 323.

[3] As to whether a document be an escrow or a complete deed, see *London Freehold &c., Co.* v. *Suffield*, [1897] 2 Ch. 608.

[4] *Wilkinson* v. *Anglo-Californian Gold Mining Co.* (1852), 18 Q. B. 728; *Exchange Bank of Yarmouth* v. *Blethen* (1885), 10 App. Cas. 293.

[5] *Arnold* v. *Mayor of Poole* (1842), 4 M. & G. 860; *Mayor of Oxford* v. *Crow*, [1893] 3 Ch. 535.

[6] *Per cur.* in *Mayor of Ludlow* v. *Charlton* (1840), 6 M. & W. at p. 823.

so that now a seal is no longer required in cases of minor contracts of daily necessary occurrence,[1] or where there is a paramount convenience such as to amount almost to a necessity in carrying out the objects for which the corporation was established.[2]

Thus, as a general rule, an inferior servant can be retained even by a non-trading corporation by parol. But this does not apply to all servants; for it has been held that the contract for the engagement of a clerk to a master of a workhouse by a board of guardians must be under seal.[3] Again, no formal contract under seal will be required when the transaction is incidental to the objects and daily business of the corporation; as, for instance, if it was a contract to repair the premises of the corporation,[4] or to buy or sell such goods as the corporation is formed to buy and sell,[5] or to purchase goods for the ordinary and regular purposes of the corporation.[6]

But when the nature of the contract is outside the expressed objects and daily business of the corporation—as in the case of a contract for the purchase of goods which are not such as those in which the corporation usually deals[7]—or when the contract is of such a magnitude or of such an unusual description as to require reasonably the formal and express assent of the corporation, no action can be maintained unless the contract be under seal.[8]

A corporation will, however, be bound by a contract not under seal of which it has received the benefit,[9] except where any statute intervenes, as in the case of contracts by local authorities.[10] Thus, where goods which a corporation has purchased by parol contract have been received and used by it, or after work has been done for the corporation and adopted by it, the objection that the contract was not under seal cannot be taken.[4] Moreover, the equitable doctrines of acquiescence and part performance apply to contracts by corporations as much as to those by private individuals.[11]

Local authorities, whether actual corporations or not, are bound by statute to make their contracts in prescribed forms. Thus by the Public Health Act, 1875,[12] "every contract made by an urban authority, whereof

[1] *Nicholson* v. *Bradfield Union* (1866), L. R. 1 Q. B. 620; *Lawford* v. *Billericay R. D. C.*, [1903] 1 K. B. 772.

[2] See *Church* v. *Imperial Gas Light Co.* (1838), 6 A. & E. 846, 861.

[3] *Austin* v. *Bethnal Green Guardians* (1874), L. R. 9 C. P. 91; and see *Dyte* v. *St. Pancras Guardians* (1872), 27 L. T. 342.

[4] *Sanders* v. *St. Neot's Union* (1846), 8 Q. B. 810.

[5] *Church* v. *Imperial Gas Light Co.*, *supra*.

[6] *South of Ireland Colliery Co.* v. *Waddle* (1869), L. R. 4 C. P. 617.

[7] *Copper Miners' Co.* v. *Fox* (1851), 16 Q. B. 229.

[8] *Homersham* v. *Wolverhampton Waterworks Co.* (1851), 6 Exch. 137.

[9] *Melbourne Banking Corporation* v. *Brougham* (1882), 7 App. Cas. 307.

[10] See *Clarke* v. *Cuckfield Union* (1852), 21 L. J. Q. B. 349; *Pauling* v. *L. & N. W Ry. Co.* (1853), 8 Exch. 867.

[11] *Laird* v. *Birkenhead Ry. Co.* (1859), Johns. 500; cf. *Crook* v. *Corporation of Seaford* (1871), L. R. 6 Ch. 551; and see *Mayor of Kidderminster* v. *Hardwick* (1873), L. R. 9 Ex. 13; *Lawford* v. *Billericay R. D. C.*, [1903] 1 K. B. 772.

[12] 48 & 49 Vict. c. 55, s. 174.

the value or amount exceeds £50, must be in writing and sealed with the common seal of such authority."

The House of Lords has held that this section is imperative, and that consequently the authority was not bound by a contract not under seal, although made by an agent appointed under seal and although they had received the full benefit of it;[1] but the requirements of the statute can be complied with after the work has been commenced, and before it is finished.[2]

All trading companies are now governed by the Companies (Consolidation) Act, 1908,[3] unless they be:—

(i.) Companies created by special Acts of Parliament, which invariably incorporate the Companies Clauses Consolidation Act, 1845;[4] or

(ii.) Companies created by letters patent, usually known as "chartered companies," whose powers to make contracts are substantially those given to a corporation by the common law; or

(iii.) Joint stock banking companies formed under the special Acts relating to banks.[5]

The Companies (Consolidation) Act, 1908, requires that all contracts made by any company within its operation shall be in accordance with section 76, which is set out in Book VI., Chap. IV.

Many railway and other statutory companies have Acts which contain provisions as to the mode of making contracts.

By various statutes the following classes of contracts are required to be in the form of a deed:—

(i.) Leases of land for three years or more.[6]

(ii.) Transfers of shares in companies incorporated under the Companies Clauses Consolidation Act, 1845.[7]

(iii.) Sales of sculpture with copyright.[8]

(iv.) Transfers of a British ship or of any share therein.[9]

(v.) Certain contracts made by registered industrial and provident societies.[10]

All feoffments and (with some exceptions) all partitions, exchanges, assignments and surrenders of any estate in

[1] *Young* v. *Mayor of Leamington* (1883), 8 App. Cas. 517; but see *Att.-Gen.* v. *Gaskill* (1882), 22 Ch. D. 537.

[2] *Bournemouth Commissioners* v. *Watts* (1884), 14 Q. B. D. 87; *Melliss* v. *Shirley, &c., Local Board of Health* (1885), 14 Q. B. D. 911.

[3] 8 Edw. VII. c. 69.

[4] 8 Vict. c. 16; see s. 97, which, however, is frequently modified by the Company's special Act.

[5] Country Bankers Act, 1826 (7 Geo. IV. c. 46); Bank Charter Act, 1844 (7 & 8 Vict. c. 113), s. 47; Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49), s. 12.

[6] Statute of Frauds, 1677 (29 Car. II. c. 3), ss. 1, 2; and see 8 & 9 Vict. c. 106, s. 3.

[7] 8 Vict. c. 16, s. 14.

[8] 54 Geo. III. c. 56, s. 4.

[9] 57 & 58 Vict. c. 60, s. 24.

[10] 56 & 57 Vict. c. 39, s. 35.

possession of freehold land must also be under seal.[1] So by the common law all remainders, reversions, advowsons, rent-charges, *profits à prendre*, easements, and all other incorporeal hereditaments can only be created or transferred by deed. But these are conveyances and not contracts.

Every deed must state with precision the parties to it and the subject-matter. The parties must be able to contract, and the subject-matter must be a legal one: for instance, in every grant there must be a grantor, a grantee, and a thing granted; in every lease, a lessor, a lessee, and a thing demised. But most deeds contain in addition elaborately worded clauses, whereby either party vouches for the truth of certain facts, or binds himself to do or to refrain from doing certain things. For example, there may be covenants for quiet enjoyment or for payment of rent or for repair of premises.[2] Particular words are unnecessary. The recital in a deed may amount to a covenant where it appears to have been the intention of the parties that it should do so.[3]

It may be difficult to determine the intention of the parties, and to interpret their covenants. "Generally speaking, the construction of a written contract is for the Court; but when it is shown by extrinsic evidence that the terms of the contract are ambiguous, evidence is admissible to explain the ambiguity, and to show what the parties really meant. That is one of Lord Bacon's maxims. Where there is an election between two meanings, it is properly a question for the jury. So, if a man devise land to his 'cousin John,' and it appears that he has two cousins named John, extrinsic evidence is admissible to show to which of them he meant the land to go." [4]

Covenants are divisible into three classes:—1. Independent covenants, where either party may recover damages for breach of the covenants in his favour, and it is no defence to allege a breach of the covenants on the part of the plaintiff. 2. Covenants conditional and dependent, where the performance of one covenant depends on the prior performance of another. 3. Covenants, sometimes called concurrent, which are mutual conditions to be performed at the same time. In these, if one party is ready and offers to perform his part, and the other neglects or refuses to perform his, he who is ready and offers thus legally fulfils his engagement, and may therefore maintain an action against the other party for his default, even though neither be obliged to do the first act.

Covenants are also classified as real, personal, or collateral. A covenant real is one annexed to an estate and to be performed on it; a covenant personal, one whereof some person in particular shall have the benefit, or whereby he shall be charged, or one which is to be performed personally by the covenantor alone. The term "collateral" (usually opposed to the term

[1] 8 & 9 Vict. c. 106, s. 3.
[2] See *post*, Chap. XIII., Landlord and Tenant.
[3] *Lay* v. *Mottram* (1865), 19 C. B. N. S. 479.
[4] *Per* Maule, J., in *Smith* v. *Thompson* (1849), 8 C. B. at p. 59.

"real" as defined above) means that the thing covenanted to be done is "merely collateral to the land, and doth not touch or concern the thing demised in any sort," or not so immediately as to pass with it to an assignee. Such a covenant is also said to be "in gross."

Certain covenants are said to "run with the land"—that is, they pass with it from assignor to assignee.[1]

A bond is an instrument under seal, whereby one person becomes bound to another for the payment of a sum of money, or for the performance of any other act or thing. The person thus bound is called the "obligor," and he to whom the bond is given the "obligee." And this obligation may be either by or to one or several persons.

If a bond be merely for the payment of money, or for the performance of some particular act, without any condition in or annexed to it, the bond is said to be single. But usually it is stipulated that if the obligor duly performs the act specified, the obligation shall be void; otherwise it shall remain in full force. In case this condition is not performed the bond becomes forfeited. In that case the entire penalty named therein was formerly recoverable by law. Now, however, by virtue of 4 & 5 Anne, c. 3, ss. 12 and 13, in the case of a bond conditioned for the payment of money, the payment of the principal sum due with interest and costs, even though the bond be forfeited and a suit has been commenced thereon, will be a full satisfaction and discharge. Also by 8 & 9 Will. III. c. 11, s. 8, damages and costs of suit only are recoverable in an action upon a bond executed by way of security for the performance of covenants contained in any deed or indenture.

At common law the breach of a stipulation as to the date by which a contract should be performed was held to be a breach of the contract. "Time was of the essence of the contract." Equity, however, inclined to substitute for the particular date a reasonable time for performance. Such stipulations are now, by the Judicature Act, to receive "the same construction and effect as they would have heretofore received in equity."[2] Mercantile contracts, save in respect of time for payment, are an exception to this rule.[3]

As soon as an instrument containing a contract is sealed by the parties, it is clothed with the following

[1] See *post*, pp. 762, 763.

[2] 36 & 37 Vict. c. 66, s. 25 (7).

[3] 56 & 57 Vict. c. 71, s. 10. As to whether a sum stipulated to be payable in the event of non-performance of a contract be a penalty or liquidated damages, see Book V., Chap. XX., Damages and the Measure of Damages.

properties, which do not attach to a simple contract in writing :—

(i.) It works a merger.

(ii.) It operates by way of estoppel.

(iii.) It requires no consideration to support it.

(iv.) It will in some cases bind the heir of the covenantor or obligor.

At common law a contract under seal could be discharged only by an instrument under seal, by the judgment of a Court of competent authority, or by Act of Parliament. But it can now, like any other contract, be rescinded by any agreement, written or parol, which is made for valuable consideration,[1] or it can be impeached on the ground of fraud or illegality.

A deed effects a merger. Being of a higher nature than a simple contract, it will, if given in relation to the same subject-matter, altogether merge or swallow up the latter and extinguish any right of action which might have been founded upon it. Thus the acceptance of a bond for a simple contract debt causes the debt to merge in the higher security.[2]

If a man covenants to pay a sum actually due, the remedy for non-payment is upon the covenant, and not upon the original cause of action. "Where a debt is secured by a bond, covenant or other specialty, there the obligation by simple contract is gone : the lesser security is merged in the greater." [3]

But the rule is subject to some qualifications. "In general, where a simple contract security for a debt is given, it is extinguished by a specialty security, if the remedy given by the latter is co-extensive with that which the creditor had upon the former." [4] A bond given for a limited sum will not, therefore, operate to merge a debt of indefinite amount. The contract under seal of a surety will not by operation of law extinguish the simple contract debt of the principal. So, if one of two makers of a joint and several promissory note executes to the holder a mortgage to secure the amount and covenants therein to pay it, the other maker is not thereby discharged. The remedy given by the specialty is confined to one of the debtors only, and therefore is not co-extensive with that which the creditor had upon the note.[5]

Where on the face of an instrument under seal the intention of the parties appears to have been that the original debt secured thereby should continue to exist, or that the security (if any) previously given should remain in force, effect will be given to their intention.

[1] See *post*, p. 751.
[2] *Wegg Prosser* v. *Evans*, [1895] 1 Q. B. 108.
[3] *Per cur.* in *Middleditch* v. *Ellis* (1848), 2 Exch. at p. 626.
[4] *Per* Bayley, J., in *Twopenny* v. *Young* (1824), 3 B. & C. at pp. 210, 211
[5] *Ansell* v. *Baker* (1850), 15 Q. B. 20.

(ii.) A deed is a "solemn and authentic act," therefore a man will always be estopped by his deed. "Where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted."[1]

But if the recital in a deed be intended to be the statement of one party only, the estoppel is confined to that party.[2] An estoppel by deed extends to persons claiming under the party who is estopped. The recitals to a deed will not estop a party in an action not founded on the deed but collateral to it.[3]

Further, an estoppel must be certain. "The law of estoppel by deed is as old as the hills. It can only be effected by what is express and clear,—by a statement by which the parties mean to bind themselves in making their contract."[4] Moreover, there is nothing in the rules relating to estoppels to prevent a deed from being impeached on the ground of fraud or illegality; though a man will be estopped from setting up his own fraud or his own illegal conduct in answer to an action on the deed.[5]

"The doctrine of estoppel has been guarded with great strictness; not because the party enforcing it necessarily wishes to exclude the truth, for it is rather to be supposed that that is true which the opposite party has already recited under his hand and seal, but because the estoppel may exclude the truth."[6]

(iii.) "A deed requires no consideration to support it." Where a contract has been duly executed by sealing and delivery, then, except in the case of a deed of feoffment or one operating by the Statute of Uses, the solemnity of the instrument dispenses with the necessity of consideration. Nevertheless, a deed is always impeachable for fraud, and fraud is frequently inferred from want of consideration.[7] Moreover, when the issue is as to the operation of the deed upon the rights of third persons, proof of the absence of consideration will be almost conclusive evidence of collusive dealing and of intention to defraud. This is true both at common law and under the statute 13 Eliz. c. 5.[8]

A deed made without consideration or founded merely on considerations of relationship or natural love and affection is called a voluntary deed; and such a deed, when made by an insolvent person, is void as against his creditors. Until 1893, a voluntary deed was void as against subsequent *bonâ fide* purchasers for value, even with notice. But by the Voluntary Conveyances Act, 1893,[9] it is enacted that no voluntary conveyance of any lands, tenements, or hereditaments, whether made before or after the passing of the Act, if in fact made *bonâ fide* and without any fraudulent

[1] *Per* Taunton, J., in *Bowman* v. *Taylor* (1834), 2 A. & E. at p. 291. "The principle of estoppel is that, whether there be a cause of action or not, the party cannot allege it:" *per* Coleridge, J., in *Parkes* v. *Smith* (1850), 15 Q. B. at p. 312.

[2] See *Stroughill* v. *Buck* (1850), 14 Q. B. at p. 787.

[3] *Ex parte Morgan*, *In re Simpson* (1876), 2 Ch. D. 72, 89.

[4] *Per* Bowen, L. J., in *Onward Building Society* v. *Smithson*, [1893] 1 Ch. at p. 14.

[5] See *post*, p. 712.

[6] *Per* Lord Denman, C. J., in *Bowman* v. *Taylor* (1834), 2 A. & E. at p. 289.

[7] *Morley* v. *Loughnan*, [1893] 1 Ch. 736; and see *post*, p. 732.

[8] See *Twyne's Case* (1602), 1 Smith's L. C., 11th ed., 3.

[9] 56 & 57 Vict. c. 21, s. 2.

intent, shall[1] be deemed fraudulent or covinous, within the meaning of 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of such Act by a conveyance made upon any such purchase, any rule of law notwithstanding.

Besides such cases there are others connected with the transfer of realty, where the existence and the nature of the consideration for a deed are important. In equity, for instance, a feoffment to a stranger without consideration or declaration of a trust is, apart from statute law and in the absence of any indication of a contrary intention, presumed to have been made for the use of the feoffor. This presumption, however, will be rebutted by proof that the smallest consideration has passed from the feoffee.

The Statute of Uses in the case of a feoffment without consideration gave to the feoffor the seisin and possession of the land, though livery of seisin had been duly made to the feoffee; the use in such circumstances "results" to the feoffor, unless the feoffment be made "to the use" of the feoffee. Those words would, before the statute, have raised a trust for the benefit of the feoffee, and now, by its operation, vest in him the seisin and possession of the land. Hence, there must either be a consideration, or the feoffment must be expressed to be made not simply "unto," but "unto and to the use of" the feoffee.

In deeds other than conveyances, assuming there is neither fraud nor illegality in the circumstances nor anything contrary to statute, the mere want of consideration for a bond or covenant will, in a Court of law, be wholly immaterial. Hence, a deed founded on consideration or on a past consideration is good, though a deed executed with a view to carrying out an illegal or even an immoral future purpose is void.

(iv.) Another characteristic of a contract under seal is that it may bind the heir and sometimes even the devisee of the contracting party, but only to the extent of assets freehold and copyhold which they have taken by descent or devise. It is no longer necessary that the heir be expressly named in the bond or covenant.[2]

The statute 32 & 33 Vict. c. 46, abolished the distinction as to priority of payment which formerly existed between the specialty and simple contract debts of deceased persons. And by the Judicature Act, 1875, s. 10, "in the administration by the Court of the assets of any person who may die after the commencement of that Act and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt."

[1] The Act does not affect transactions completed before the passing of the Act (s. 3).

[2] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 59.

There are many defences available in answer to an action brought upon a covenant contained in a deed. The defendant may allege:—

(a) That he never executed the deed. This was formerly known as a plea of *non est factum*—"I never made the deed."

(b) That he was induced to execute the deed by fraud.

(c) That the object of the deed was illegal.

(d) That the deed has been altered in some material particular.

(e) That the contract under seal has been released or discharged or is barred by a Statute of Limitation.

(a) A man sued upon a deed may plead *non est factum*, if the deed, though sealed or signed by him, was executed under a total mistake as to its nature and in the genuine belief that he was signing a document of a totally different kind.

In *Thoroughgood's Case*[1] it was held that if an illiterate man have a deed falsely read over to him, and he then seals and delivers the parchment, that parchment is nevertheless not his deed. If a grantor or covenantor be deceived or misled as to the actual contents of the deed, the deed does not bind him.[2] If a deed be delivered, and a blank left therein be afterwards improperly filled up (at least if that be done without the grantor's negligence), it is not the deed of the grantor.[3] "These cases apply to deeds, but the principle is equally applicable to other written contracts."[4]

But it is otherwise if the party knew that he was executing a deed, and that it dealt with the property to which it in fact relates.[5] Thus, where an illiterate man was induced by his solicitor to execute a deed on the ground that it was a deed in connection with his property, the deed, which was in fact a mortgage of his property, was held to be his deed. He did not know the contents of the deed, and he never meant to execute a mortgage, but he knew that it was a deed connected with his property, therefore he could not say "it is not my deed."[6]

(b) Fraud is a good defence at law to an action even upon so solemnl authenticated an instrument as a deed. Where a party has been induce to execute a deed by fraud, he may either sue or counterclaim to have the deed declared void, and delivered up to him as cancelled.

(c) It is a good defence to an action upon a contract under seal that it

[1] (1583), 2 Rep. 9; and see *Pigot's Case* (1615), 11 Rep. 27 b.

[2] See *Edwards* v. *Brown* (1831), 1 C. & J. 307, 312.

[3] *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175.

[4] *Per* Byles, J., in *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. at p. 712. See *Lewis* v. *Clay* (1897), 67 L. J. Q. B. 224.

[5] See the remarks of A. L. Smith, L. J., in *Onward Building Society* v. *Smithson*, [1893] 1 Ch. at p. 15.

[6] *King* v. *Smith*, [1900] 2 Ch. 425. See *Bagot* v. *Chapman*, [1907] 2 Ch. 222; *Howatson* v. *Webb*, [1907] 1 Ch. 537; [1908] 1 Ch. 1.

was executed for an illegal consideration. In *Collins* v. *Blantern*[1] the plaintiff sued on a bond intended to secure to him the repayment of a sum of 350*l*. It appeared, however, that he had advanced the money in order to settle a criminal prosecution. The bond was therefore vitiated. "This," observed Lord Wilmot, C. J., "is a contract to tempt a man to transgress the law, to do that which is injurious to the community: it is void by the common law, and the reason why the common law says such contracts are void is for the public good. You shall not stipulate for iniquity. All writers upon our law agree in this,—no polluted hand shall touch the pure fountains of Justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again."[2]

In *The Gas Light and Coke Co.* v. *Turner*,[3] a plea to an action on a covenant for rent due under a lease alleging that the premises in question were demised to the defendant for an unlawful purpose, was held to be good. "The objection that has been urged on the part of the defendant," said Tindal, C. J., "is, that this is an action founded upon a contract, and that a Court of law will not lend its aid to enforce the performance of a contract between parties which appears upon the face of the record to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. And we think, both from authority and reason, this objection must be allowed to prevail. That no legal distinction can be supported between the application of this objection to parol contracts and to contracts under seal appears the necessary inference from the cases of *Collins* v. *Blantern* and *Paxton* v. *Popham*,[4] in both which cases the principle above laid down was acted upon by the Court; and in each of which the action was upon a bond; and it would, indeed, be inconsistent with reason and principle to hold, that, by the mere ceremony of putting a seal to an instrument, that is, by the voluntary act of the parties themselves, a contract which was void in itself on the ground of its being in violation of the law of the land, should be deemed valid, and an action be maintainable thereon in a Court of justice."

It does not follow, however, that a deed tainted with illegality in its inception is necessarily void as between all parties and for all purposes.[5] A conveyance made with the object of contravening a particular statute may be invalidated thereby so far as that object is concerned, and yet may remain effectual as a conveyance against the grantor. Thus a conveyance made for the mere purpose of conferring a vote has been held void only to

[1] (1767), 1 Smith's L. C., 11th ed., 369. See the notes to this case.

[2] *Ib.* at pp. 373, 374. And see *Higgins* v. *Pitt* (1849), 4 Exch. 312; *Mallalieu* v. *Hodgson* (1851), 16 Q. B. 689, and cases there cited.

[3] (1839), 5 Bing. N. C. 666, 675, with which compare *Feret* v. *Hill* (1854), 15 C. B. 207, where the plaintiff had been forcibly expelled by the defendant from premises held under a written agreement into which the defendant had been induced to enter by the plaintiff's misrepresentations: ejectment was held maintainable, inasmuch as an interest in the demised premises had actually passed by the agreement. And see the remarks of Maule, J., *ib.* at p. 213, and the judgment in *Fisher* v. *Tully* (1878), 3 App. Cas. at p. 639.

[4] (1808), 9 East, 408.

[5] See *Waugh* v. *Morris* (1873), L. R. 8 Q. B. 202.

the extent of preventing the right of voting from being acquired, but valid between the parties to pass an interest in the land. Although the statute 13 Eliz. c. 5, rendered void an assignment of property made by an insolvent person in fraud of his creditors, nevertheless such an assignment may be binding and unimpeachable as between the assignor and assignee.[1]

(d) In order to prevent the possibility of fraud, the law formerly held that any alteration of a deed after its execution, by a party thereto, even in a part that was not material, would make the deed void.[2] Now, however, an immaterial alteration so made will not avoid a deed;[3] though it is otherwise if the alteration be material and contrary to the apparent intention of the original. Thus in *Ellesmere Brewery Co.* v. *Cooper*,[4] B., C., D. and E. consented to become sureties for A. and executed a joint and several bond of suretyship, by the terms of which the liability of B. and C. was limited to 50*l.* each, and that of D. and E. to 25*l.* each. B. executed the bond after three other sureties had done so, and expressly limited his liability to 25*l.* by adding to his signature the words "25*l.* only." This he did in good faith. In an action against his sureties on default of payment by A. it was held that the effect of adding the words was to make a material alteration in the bond, so that C., D. and E. were thereby discharged from their obligation; and that as B.—the last surety who had signed the bond—had only executed it as a joint and several bond, he also was not bound by it.

(e) It is no longer law that a contract under seal can only be discharged by a formal release under seal. On the contrary, it can now be rescinded by any subsequent agreement, written or parol, made between the parties for valuable consideration. An agreement made by a creditor for good consideration that he will not sue on a bond will be an answer to an action on the bond. "Such an agreement, unless there is some reason for not enforcing it, has in equity the effect of a release."[5]

Again, the obligation created by a specialty may of course be discharged by an express statute. Bonds and specialty debts were by the common law presumed to have been satisfied after twenty years had passed without any payment or acknowledgment of indebtedness thereunder; and the same number of years has now been fixed by statute as the period of limitation in the case of an action based upon any such debt.[6] In this respect contracts under seal differ from simple contracts, actions upon which are, as a rule, barred as soon as six years have elapsed from the date at which the cause of action accrued.

[1] *Bessey* v. *Windham* (1844), 6 Q. B. 166.
[2] *Pigot's Case* (1615), 11 Rep. 26 b.
[3] *Bishop of Crediton* v. *Bishop of Exeter*, [1905] 2 Ch. 455.
[4] [1896] 1 Q. B. 75.
[5] *Per* Lindley, L. J., in *Edwards* v. *Walters*, [1896] 2 Ch. at p. 168.
[6] 3 & 4 Will. IV. c. 42, s. 3.

## Chapter III.

### Simple Contracts and Consideration.

A simple contract is one which is (i.) in writing not under seal, or (ii.) in words, or (iii.) implied from the conduct of the parties, or (iv.) partly in writing and partly in words or implied from conduct.

An agreement is not a contract unless the terms are definitely settled. Since a contract is based on the mutual consent of the parties, it can have no binding force as long as the negotiations are still open.

Thus, where A. telegraphed, "Will you sell us Bumper Hall Farm? Telegraph lowest cash price," and B. replied, "Lowest price £900," whereupon A. telegraphed accepting the property at the price, it was held that the mere statement of the lowest price at which the vendor would sell contained no implied contract to sell at that price to the persons making the inquiry, and that there was no completed contract.[1] So, too, if A. applies for an absolute and unqualified allotment of shares in a projected company, and the letter of allotment contains the qualifications that the shares are not transferable, the offer and the acceptance, not being *ad idem*, will together fail to establish a binding contract.[2] And generally "where a contract is to be made out by an offer on one side and an acceptance on the other,[3] if the answer is equivocal, or anything is left to be done, the two do not constitute a binding contract."[4]

Where, moreover, the existence and nature of a contract are to be gathered from correspondence between the parties, the whole of that which passed between them must be taken into consideration,[5] and must show an unqualified acceptance of the offer made, into which no new term, unless assented to, can be introduced.[6] The fact that the parties agree to

[1] *Harvey* v. *Facey*, [1893] A. C, 552.
[2] *Duke* v. *Andrews* (1848), 2 Exch. 290.
[3] See *English and Foreign Credit Co.* v. *Arduin* (1871), L. R. 5 H. L. 64.
[4] *Per* Grove, J., in *Appleby* v. *Johnson* (1874), L. R. 9 C. P. at p. 163.
[5] *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. 311.
[6] As to effect of a covering letter introducing a new term, see *Maconchy* v. *Trower*. [1894] 2 Ir. R. 663.

clothe their contract subsequently in more formal language need not make the contract incomplete.[1] If a man accepts an offer, for example, for the sale of a freehold "subject to my solicitor's approval," such words may go to show that negotiations are still open, or on the other hand they may be merely a safeguard that the title be investigated in the ordinary way.[2]

Mercantile contracts are naturally often contained in letters. If A. makes an offer by letter to B., and B. accepts unconditionally, the contract is complete when B.'s letter is posted, even if it never reaches A.[3] But A. cannot withdraw his offer merely by posting a subsequent letter which does not, in the ordinary course of the post, arrive until after his first letter has arrived and been answered.[4]

"An uncommunicated revocation is, for all practical purposes, no revocation at all."[5] Thus where the defendant applied for shares in the plaintiff company, and the company allotted the shares to the defendant and duly addressed to him and posted a letter notifying the allotment, which letter the defendant never received, it was nevertheless held that he had become a shareholder in the company when the letter was posted.[6] There might be a question as to whether the post was the natural means of communicating an acceptance. In *Henthorn* v. *Fraser* Lord Herschell says,[7] "Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted." "Posting an acceptance of an offer may be sufficient where it can be fairly inferred from the circumstances of the case that the acceptance might be sent by post."[8] There is, however, no valid acceptance in such a case unless the letter is actually posted. It is not enough merely to give the letter to someone else to post.[9]

[1] See *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124, and the remarks of Kay, J., in *Bristol Aërated Bread Co.* v. *Maggs* (1890), 44 Ch. D. at pp. 625, 626; and of North, J., in *Bellamy* v. *Debenham* (1890), 45 Ch. D. at pp. 492—495.

[2] See the remarks of Lord Cairns, L. C., in *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. at pp. 321, 322; and *Lloyd* v. *Nowell*, [1895] 2 Ch. 744.

[3] *Dunlop* v. *Higgins* (1848), 1 H. L. Cas. 381, 398; *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216.

[4] *Byrne* v. *Van Tienhoven* (1880), 5 C. P. D. 344; approved in *Henthorn* v. *Fraser*, [1892] 2 Ch. 27.

[5] *Per* Lush, J., in *Stevenson* v. *Maclean* (1880), 5 Q. B. D. at p. 352; approved in *Henthorn* v. *Fraser*, *supra*.

[6] *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216.

[7] [1892] 2 Ch. at p. 33; and see the remarks of Bowen, L. J., in *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. at p. 269.

[8] *Per* Kay, L. J., [1892] 2 Ch. at p. 36.

[9] See *In re London and Northern Bank*, [1900] 1 Ch. 220.

A contract is not complete and binding unless there is mutuality between the parties. But in certain kinds of contracts legal liability attaches to, and can be enforced against, one only of the contracting parties.

For example, the contract of an infant is in most cases voidable at his election, though binding upon any adult who contracts with him. A man who executes a guarantee assumes liability, without having any power to compel the party to whom such security is given to supply the goods, or to extend the credit in pursuance of the terms of the guarantee. Thus, where A. says to B., "If you will employ C. as your agent for a week, I will be responsible for all such sums as he shall receive during that time and neglect to pay over to you :" B. is not bound to employ C. at all ; but if he does employ him, then the guarantee attaches and becomes binding upon A.

In general, however, there must be mutuality between the parties. Consequently, where the plaintiff undertook for a period of twelve months to provide waggons, horses, &c., for the cartage of merchandise between H. and W., and to convey all such as might be presented to him for conveyance between those places at a certain specified rate, and the defendants terminated the agreement before the expiration of twelve months, it was held that no action could be maintained. The contract, containing no provision binding them to send goods to the plaintiff for conveyance, was unilateral merely and without mutuality.[1] A person, who tenders to supply goods in answer to an advertisement and whose tender is accepted, is bound to supply the goods when ordered, although no order for them need ever be given.[2]

There is one case in which one party may be bound and not the other—namely, where he has for valuable consideration bound himself to sell on certain terms if the other chooses to avail himself of the offer. It "is merely an offer which cannot be withdrawn, and does not connote an agreement to buy."[3]

The acceptance of an offer must be identical with the terms of the offer.

Thus, in an American case, where A. offered to buy flour of B., and stipulated that B. should send an answer by the waggon which conveyed the offer, an answer, sent by B. by mail instead of by the waggon, was held not to be an acceptance.[4]

An acceptance cannot impose on the offeror a variation of his original offer : such a proposed variation can only amount to a fresh offer in itself.[5]

[1] *Burton* v. *G. N. Ry. Co.* (1854), 9 Exch. 507.
[2] *G. N. Ry. Co.* v. *Witham* (1873), L. R. 9 C. P. 16.
[3] *Per* Lord Herschell, L. C., in *Helby* v. *Matthews*, [1895] A. C. at p. 477.
[4] *Eliason* v. *Henshaw* (1819), 4 Wheaton, 225.
[5] See *Felthouse* v. *Bindley* (1862), 11 C. B. N. S. 869.

Where the parties name a time during which the offer shall remain open, the offeror is free to revoke it, unless there has been an acceptance, within that time;[1] if the offer has not been so revoked, the offeree may of course accept it within the time specified. Where no period is mentioned, acceptance must be made within a reasonable time.[2]

"Options," or agreements by which one person gets the right to purchase something (for example, stocks or land) at a future time at a fixed price, may be enforced if made for valuable consideration.[3]

It is a rule of English law that acceptance of an offer must be notified to the offeror, either by words, writing or conduct. But this rule has one exception, viz., where the offeror dispenses with such notice. He may do this by expressly or impliedly intimating a particular mode of acceptance. For example, a company which owns automatic machines may intimate to the public that the placing of a penny in the slot is a sufficient acceptance of the company's offer without notification. "If," said Bowen, L. J.,[4] "the person making the offer expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification. . . . This seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L. J., in *Harris' Case*,[5] and the very instructive judgment of Lord Blackburn in *Brogden* v. *Metropolitan Railway Co.*" [6] One may look at the offer itself to find out whether the offeror does intimate that the performance of a condition is a sufficient acceptance of his offer without communication.

Though an offer need not be made to a definite person, it must be accepted by a definite person. Advertisements offering

[1] *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463.
[2] *Ramsgate Hotel Co.* v. *Montefiore* (1866), L. R. 1 Ex. 109.
[3] See *Buitenlandsche Bankvereeniging* v. *Hildesheim* (1903), 19 Times L. R. 641.
[4] *Carlill* v. *Carbolic Smoke Ball Co.*, [1893] 1 Q. B. at pp. 269, 270; and see *Powell* v. *Lee and others* (1908), 99 L. T. 284.
[5] (1872), L. R. 7 Ch. 587.
[6] (1877), 2 App. Cas. at p. 690.

a reward for the supply of information (as in *Williams* v. *Carwardine*[1]), or offering to pay a sum of money to any person who after use of a carbolic smoke ball should catch influenza,[2] are made to persons unspecified. But if anyone complies with the conditions of the offer (and, on principle it would seem, provided he knew of the offer at the time of acceptance), the offer is turned into a contract. As to the latter point whether knowledge of the offer is essential to acceptance, there is no English decision; but the American case of *Fitch* v. *Snedaker*[3] held that such knowledge was essential, and in *Carlill* v. *Carbolic Smoke Ball Co.*, Hawkins, J., referring to *Williams* v. *Carwardine*,[1] said that he presumed the plaintiff knew of the offer when she gave the information.[4]

In general, where an offer is uncommunicated, it does not admit of acceptance. The offeror has no legal rights against the person to whom the offer purports to be made; the latter has had no opportunity to reject the offer. A contract to pay for services is not implied from the mere recognition or acceptance of such services, if the alleged acceptor had at the time no power or option to adopt or repudiate them.[5]

Advertisements which invite persons in general terms to do business with the advertiser need not amount to offers capable of being turned into definite contracts. They may be merely invitations to make offers.

If A. is an auctioneer and has advertised the sale of certain goods, he cannot be sued in contract by an intending purchaser who attends the sale and finds that A. has withdrawn the goods which he wished to buy.[6] A.'s announcement was not intended to define the terms of a binding contract. And if A. advertises an offer to sell goods by tender, his offer cannot be turned into a binding contract to sell the goods to the highest bidder.[7] Similarly, the announcement of a scholarship examination cannot be made a binding contract to award the scholarship to the competitor who gains the highest marks.[8]

Where offers are communicated upon printed forms, there may be doubt whether the acceptor was aware of all the

[1] (1833), 4 B. & A. 621.
[2] *Carlill* v. *Carbolic Smoke Ball Co.*, *supra*.
[3] (1868), 38 N. Y. 248.
[4] See the note which he appended to his judgment, [1892] 2 Q. B. at p. 489.
[5] *Taylor* v. *Laird* (1856), 25 L. J. Ex. 329.
[6] *Harris* v. *Nickerson* (1873), L. R. 8 Q. B. 286.
[7] *Spencer* v. *Harding* (1870), L. R. 5 C. P. 561.
[8] *Rooke* v. *Dawson* (1895), 64 L. J. Ch. 301; 65 L. J. Ch. 31.

conditions contained upon the form. For example, a telegraph form, or a cloak-room receipt, or a railway or steamship company's ticket may contain, in an unobtrusive position, special conditions which restrict the liability arising from the offer.

In general, where there is no fraud, the acceptance of a written or printed offer binds the acceptor to all the written or printed terms thereof in spite of his ignorance of them.[1]

Thus, where a railway passenger deposited luggage in a cloak-room and received a ticket containing the words "subject to the conditions on the other side" (one of which was that the company would not be liable beyond the sum of £5 for loss or injury to the package), it was held that the depositor, who knew there were conditions on the back but did not read them, was bound by them.[2]

But if the printed form purports to be nothing more than a receipt or unconditional ticket, a person who reasonably assumes that it contains nothing more will not be bound by any conditions which it may in fact contain, unless he either knows at the time of making the contract that it contained conditions, or unless the party issuing the document took reasonable steps to give him notice of the fact that it was only upon such conditions that business could be undertaken.[3] In deciding whether the acceptor has notice of the terms and conditions, regard may be had to the class of person for whom the notice is intended.[4]

The validity of contracts under seal is founded on their form: they require no consideration. Simple contracts, however, can (apart from statutory requirement) dispense with form: they are founded on consideration.

Consideration is something which the promisee does or forbears in return for the promise. "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit, accruing to the one party,

[1] See the remarks of Mellish, L. J., in *Parker* v. *S. E. Ry. Co.* (1877), 2 C. P. D. at p. 421.

[2] *Harris* v. *G. W. Ry. Co.* (1876), 1 Q. B. D. 515.

[3] *Henderson* v. *Stevenson* (1875), L. R. 2 H. L. Sc. 470; *Watkins* v. *Rymill* (1883), 10 Q. B. D. 178.

[4] See *Richardson, Spence & Co.* v. *Rowntree*, [1894] A. C. 217; and *ante*, p. 648.

or some forbearance, detriment, loss or responsibility, given, suffered or undertaken by the other."[1] "A prejudice to the promisee incurred at the request of the promisor may be a consideration as well as a benefit to the promisor proceeding from the promisee: but this must be a prejudice on entering into the contract, not a prejudice from the breach of it."[2] Unless consideration be present, there can be no valid simple contract.

"Consideration means something which is of some value in the eye of the law, moving from the plaintiff. It may be some benefit to the defendant, or some detriment to the plaintiff, but, at all events, it must be moving from the plaintiff."[3] There must be no want of privity. "No stranger to the consideration can take advantage of a contract, though made for his own benefit."[4]

Thus, where the articles of association of a company appointed A. as permanent solicitor to the company, it was held that A. could not sue the company for breach of contract in not employing him. "It is a matter between the directors and shareholders and not between them and the plaintiff."[5] If B. promises C. to do something for C.'s son, C.'s son is a stranger to the consideration, in spite of the close relationship and natural affection between son and father.[6] And "if I give a sum of money to my servant to pay a tradesman, the latter cannot maintain an action for money had and received against the servant."[7]

Consideration must be "of some value in the eye of the law." It need not be of great or obvious value, but the flagrant inadequacy of a consideration might be some evidence of fraud.

Where A. allowed B. to take some boilers and weigh them, the parting with the possession was held a sufficient consideration.[8] And where C. gave up a document which was in fact worthless, this also was sufficient.[9] If D. deposits his goods with E. as a bailee, D.'s parting with the possession of them will suffice as consideration for E.'s express promise to do

[1] *Per cur.* in *Currie* v. *Misa* (1875), L. R. 10 Ex. at p. 162.
[2] *Per cur.* in *Gerhard* v. *Bates* (1853), 2 E. & B. at pp. 487, 488.
[3] *Per* Patteson, J., in *Thomas* v. *Thomas* (1842), 2 Q. B. at p. 859.
[4] *Per* Wightman, J., in *Tweddle* v. *Atkinson* (1861), 1 B. & S. at p. 396. See, however, *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577.
[5] *Eley* v. *Positive Life Assurance Co.* (1876), 1 Ex. D. 88; *per* Lord Cairns, L. C., *ib.* at p. 90. And see *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174.
[6] *Tweddle* v. *Atkinson*, *suprà*.
[7] *Per* Parke, J., in *Baron* v. *Husband* (1833), 4 B. & Ad. at p. 612.
[8] *Bainbridge* v. *Firmstone* (1838), 8 A. & E. 743.
[9] *Brooks* v. *Haigh* (1840), 10 A. & E. 323.

work upon them or his implied promise to take reasonable care of them. In such cases of gratuitous bailment, the common law introduces into the contractual relationship of the parties the duty to use due care; D. may, therefore, have a right of action for negligence against E.[1] If F. undertakes to do some work for G. without reward, G. cannot sue him if he refuses to do it; for the contract between F. and G. is void for want of consideration. Nevertheless, if F. begins to do the work, G. can then sue him if he does not use reasonable care.[2]

Consideration is, of course, of infinite variety. "Wherever a man may do an act without a breach of any legal or moral obligation, that act may be a valid consideration for a promise to pay money to him or to do any other thing."[3] The compromise of a claim may be a good consideration for a promise, though litigation may not have begun;[4] but to make it so, the party forbearing must believe that he has a good case.[5] It has also been held that where such belief exists it is immaterial that there was in reality no cause of action.[6]

In *Lyth* v. *Ault and Wood*,[7] the acceptance by a creditor of the sole and separate liability of one of two joint debtors was held to be good consideration for an agreement to discharge the other debtor from liability. The contract here disclosed might at first seem a mere *nudum pactum*, for the creditor gets nothing in return for his relinquishment of his claim against such last-mentioned party. But the substituted liability was in its nature different from the original liability; therefore, since the Court will not inquire into the adequacy of the consideration for a promise, the agreement in question would be unimpeachable in a strictly legal point of view. Plainly the sole security of A. may be a better thing than the joint security of A. and B.; for by accepting the sole security of A., instead of the joint security of both debtors, the creditor possesses a legal remedy against A. during his lifetime, and against his assets after his death, and no security whatever against B. The two sets of security are different, therefore a bargain to take the one for the other is good.[8]

But although a Court of law will not inquire into the adequacy of the consideration for a promise, it will inquire so far as to satisfy itself that the consideration is of some value. Mere motive is not enough.

Where A.'s executor agreed to allow A.'s widow to occupy a house in accordance with her late husband's express wish, the widow failed in an action against the executor for breach of contract. The desire of the

[1] See *Turner* v. *Stallibrass*, [1898] 1 Q. B. at p. 60. As to bailments, see *Coggs* v. *Bernard* (1703), 1 Smith's L. C., 11th ed., 173; and *ante*, pp. 629, 630.
[2] *Elsee* v. *Gatward* (1793), 5 T. R. 143.
[3] *Per* Lord Campbell, C. J., in *Hall* v. *Dyson* (1852), 21 L. J. Q. B. at p. 226.
[4] *Cook* v. *Wright* (1861), 1 B. & S. 559.
[5] *Wade* v. *Simeon* (1846), 2 C. B. 548.
[6] See *Miles* v. *New Zealand, &c., Co.*, (1885), 32 Ch. D. 266.
[7] (1852), 7 Exch. 669.
[8] *Ib.* at pp. 671, 674, 675.

executor to obey A.'s wish was no consideration. "Motive is not the same thing as consideration."[1] And where the consideration for the defendant's promise was stated to be the release and conveyance by the plaintiff of his interest in certain premises at the defendant's request, but the declaration did not show that the plaintiff had any interest in the said premises, except a lien upon them, which was expressly reserved by him, the declaration was held bad as disclosing no legal consideration for the alleged promise.[2]

If a man merely does what the law requires of him, or if he does what he is already bound to do under an existing contract, that is no consideration.

Two sailors deserted on a voyage, and the captain promised the remaining members of the crew that, if they would work the ship home, they should have the two men's wages divided amongst them. This agreement was void for want of consideration. "Before they sailed from London they had undertaken to do all they could under the emergencies of the voyage." The desertion was such an emergency, and the crew were already bound to work the vessel home.[3] But additional and uncontemplated risks might be a good consideration.[4]

Apparently the performance by A. of what he has contracted with B. to do, will not be a proper consideration for a further promise by C.[5]

If a man is obliged to attend the Court as a witness under a *subpœna* (and is, therefore, entitled to be paid his conduct money and proper expenses), his attendance is no consideration for a promise to pay him an additional sum.[6]

A past consideration is *primâ facie* no consideration.

Thus, in *Roscorla* v. *Thomas*,[7] the plaintiff pleaded that, in consideration that he had at the defendant's request bought of the defendant a horse at a certain price, the defendant promised that the horse was sound and free from vice, &c., whereas the horse was not in fact free from vice. It was held that the past consideration was insufficient to support the subsequent alleged promise. "A consideration past and executed will support no other promise than such as would be implied by law."[8]

So, where an account has been stated between parties, and a balance ascertained to be due from one of them to the other, the law implies a promise by the debtor to pay on request, so that any subsequent promise

[1] *Thomas* v. *Thomas* (1842), 2 Q. B. 851, 859.
[2] *Kaye* v. *Dutton* (1844), 7 M. & Gr. 807.
[3] *Stilk* v. *Myrick* (1809), 2 Camp. 317; see *Harris* v. *Carter* (1854), 3 E. & B. 559.
[4] *England* v. *Davidson* (1840), 11 Ad. & E. 856; *Hartley* v. *Ponsonby* (1857), 7 E. & B. 872.
[5] *Shadwell* v. *Shadwell* (1860), 9 C. B. N. S. 159; but see *Scotson* v. *Pegg* (1861), 6 H. & N. 295.
[6] *Collins* v. *Godefroy* (1831), 1 B. & A. 950; see *Chamberlain* v. *Stoneham* (1889), 24 Q. B. D. 113.
[7] (1842), 3 Q. B. 234.
[8] *Per* Lord Denman, C. J., *ib.*, at p. 237.

by him differing in its nature therefrom (*e.g.*, to pay on a particular day named) would be *nudum pactum*, unless made upon a new consideration. Otherwise there might be two co-existing promises on one consideration.[1]

The apparent exception to the rule that a past consideration will not support a contract occurs where a past performance has been requested. The request raises the inference of a promise to pay a reasonable sum in return for the performance; and the subsequent promise to pay shows what sum is thought reasonable. "That promise may be treated either as an admission which evidences, or as a positive bargain which fixes the amount of, that reasonable remuneration on the faith of which the service was originally rendered."[2]

Thus where a man, having committed a murder, asked another man to work for his pardon and subsequently, in consideration of the work done, promised to reward him £100, it was held that the promise could be sued upon.[3] "Probably at the present day such service on such a request would have raised a promise by implication to pay what it was worth; and the subsequent promise of a sum certain would have been evidence for the jury to fix the amount."[4]

Sometimes the law will dispense with the necessity for any antecedent request. For example, if A. adopts the benefit of a past performance, or if B. or C. has been compelled to do what A. was legally bound to do, then, although A. never requested the performance, he is bound to pay for it. Again, if B. or C. without compulsion does what A. is legally bound to do (*e.g.*, pays his debts), and A., in consideration of his action, promised to indemnify him, this promise will be enforceable in law although it was made after the consideration, for it had been performed.[5] "Where a relation exists between two parties, which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him."[6]

It was laid down as a general rule in 1848 that "where the

[1] See *Hopkins* v. *Logan* (1839), 5 M. & W. at p. 249.
[2] *Per* Bowen, L. J., in *Stewart* v. *Casey*, [1892] 1 Ch. at p. 116.
[3] *Lampleigh* v. *Brathwait* (1616), 1 Smith's L. C., 11th ed., 141.
[4] *Per* Erle, C. J., in *Kennedy* v. *Broun* (1863), 13 C. B. N. S. at p. 740.
[5] See *Wing* v. *Mill* (1817), 1 B. & Ald. 104.
[6] *Per cur.* in *Morgan* v. *Ravey* (1861), 6 H. & N. at p. 276.

consideration for a promise was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law meant for his advantage, he may renounce the benefit of that law. And, if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to pay it." [1] A debt barred by the Statute of Limitations is unquestionably a sufficient consideration for every promise to pay it, whether absolute or conditional,[2] and any promise to pay such a debt simply or by instalments, or when the party is able, will be supported by the past consideration. But in other cases this rule does not apply. Thus since the passing of the Infants Relief Act, 1874,[3] no promise made by a person of full age to satisfy debts contracted during infancy is binding upon him. And since the Bankruptcy Act, 1849,[4] no promise made by a discharged bankrupt to pay a debt from which he is discharged will be binding upon him, unless it be made for a fresh and valuable consideration.[5] It will be observed that in the first case the Statute of Limitations merely bars the remedy: it does not destroy the debt; whereas a promise by an infant is now in most cases void *ab initio*, and a discharge in bankruptcy puts an end to all debts, which were or might have been proved thereunder. The existence of an antecedent debt is not in itself valuable consideration for a security given by a debtor.[6]

A moral consideration, or the existence of a moral duty owed by the defendant to the plaintiff, is not sufficient consideration for a subsequent express promise. If the existence of a moral duty were to be tolerated as a good legal consideration in contract, "the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it." [7]

[1] *Per* Parke, B., in *Earle* v. *Oliver* (1848), 2 Exch. at p. 90.

[2] See the judgment of Parke, B., in *Reeves* v. *Hearne* (1836), 1 M. & W. at p. 327. Such promise, however, must be in writing and signed by the promisor or his agent: 9 Geo. IV. c. 14, s. 1; 19 & 20 Vict. c. 97, s. 13.

[3] 37 & 38 Vict. c. 62.

[4] 12 & 13 Vict. c. 106.

[5] See *Jakeman* v. *Cook* (1878), 4 Ex. D. 26; *Ex parte Barrow, In re Andrews* (1881), 18 Ch. D. 464.

[6] *Wigan* v. *English and Scottish, &c., Association*, [1909] 1 Ch. 291, 303.

[7] *Per cur.* in *Eastwood* v. *Kenyon* (1840), 11 A. & E. at p. 450.

The mere moral obligation on a father to maintain his child affords no inference of a legal promise to pay his debts; so that "if a father turns his son upon the world, the son's only resource, in the absence of anything to show a contract on the father's part, is to apply to the parish, and then the proper steps will be taken to enforce the performance of the parent's legal duty." [1] If, indeed, a father does any specific act, from which it may reasonably be inferred that he has authorised his son to contract a debt, he may be liable in respect of the debt so contracted.[2] But the law does not authorise a son to bind his father by his contracts.[3] Nor is there any legal obligation on the personal representative of the mother of a bastard child to expend the assets of the deceased in the maintenance of the child.[4]

[1] *Per* Jervis, C. J., in *Shelton* v. *Springett* (1851), 11 C. B. at p. 455.
[2] *Per* Lord Abinger, C. B., in *Mortimore* v. *Wright* (1840), 6 M. & W. at p. 487.
[3] *Per* Maule, J., 11 C. B. at p. 456.
[4] *Ruttinger* v. *Temple* (1863), 4 B. & S. 491.

## Chapter IV.

### CONTRACTS REQUIRED BY LAW TO BE IN WRITING.

Our common law requires, as a general rule, that the best evidence shall be given of which the nature of the case admits. Thus, where an agreement between two parties has been reduced into writing, that writing itself offers the best evidence which can be given for determining what the intentions of the parties really were, and what their reciprocal obligations are. "It is contrary to the rules of law to admit extrinsic evidence to show that the intention of a party executing a written instrument is different from that apparent on the face of the instrument itself." [1]

Hence, if there be a written contract between A. and B., which is duly signed by them and was meant by them to constitute a complete and entire agreement,[2] evidence to show what passed by word of mouth between the parties, either before the written instrument was made or during the time that it was in a state of preparation and adjustment, is inadmissible to vary its effect, unless it is asserted that the contract be tainted with fraud or some other illegality. When, however, an agreement has been reduced into writing, it is always open to the parties, at any time before breach of it, by a new contract not in writing either altogether to waive, dissolve or annul the former agreement, or to add to or vary the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted thereupon, unless the agreement be of a kind which is required by some statute to be in writing. Parol evidence is not admissible to prove a subsequent agreement to vary the terms of a contract

[1] *Per* Abbott, C. J., in *Woodbridge* v. *Spooner* (1819), 3 B. & Ald. at p. 235.

[2] An invoice is only evidence of a contract, not a contract *per se*: *Holding* v. *Elliott* (1860), 5 H. & N. 117. As to a receipt, see *post*, p. 745.

in writing, which is required by law to be in writing, although it can be admitted to prove rescission of such a contract.[1]

Thus, the acceptor of a bill of exchange cannot set up an oral contract entered into before his acceptance of the bill, which is inconsistent with the contract appearing upon the face of it.[2] Neither can a like contemporaneous agreement, incompatible with that evidenced by the bill, be set up to vary or restrain it. Evidence cannot be received of an oral agreement that a bill drawn payable at three months shall not be payable till the expiration of four months from its date. "It would be very dangerous to allow a party to alter in such a manner the absolute contract on the face of a bill of exchange; the effect of the cases is, that you are estopped from saying that you made any other contract than the absolute one on the face of the bill. A contract, which seeks by subsequent oral matter to discharge altogether the contract created by the bill and create a new one, is wholly different."[3]

Again, where money was advanced upon the security of a joint and several promissory note by a loan society and, at the time of effecting the loan and making the note, a printed book of the society's rules was given to the defendant who was one of the makers of the note, it was held that these rules could not be received in evidence to vary the express contract as stated on the face of the note.[4]

But it must be borne in mind that this rule, which excludes parol evidence at variance with a written contract, does not apply when it is alleged that the contract was signed as the result of some mistake, misrepresentation or fraud.[5] Parol evidence is admissible to show that there was no contract at all,[6] or that it was never reduced into writing, or that this is not the writing into which it was reduced. Parol evidence is also admissible to annex to a contract certain customary incidents which the parties had in their minds and took as a matter of course and therefore did not trouble to express in writing. But such customary incidents must not be inconsistent with the written terms.[7] Similarly parol evidence may be admitted in order to explain phrases or to identify

[1] *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58; *Giraud* v. *Richmond* (1846), 2 C. B. 835; *Evans* v. *Roe* (1872), L. R. 7 C. P. 138; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634.

[2] *New London Syndicate* v. *Neale*, [1898] 2 Q. B. 487.

[3] *Per* Lord Abinger, C. B., in *Adams* v. *Wordley* (1836), 1 M. & W. at p. 380.

[4] *Brown* v. *Langley* (1842), 4 M. & Gr. 466; and see *Maillard* v. *Page* (1870), L. R. 5 Ex. 312, 319.

[5] *Wake* v. *Harrop* (1862), 31 L. J. Ex. 451; *Pattle* v. *Hornibrook*, [1897] 1 Ch. 25; *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215.

[6] *Pym* v. *Campbell* (1856), 6 E. & B. 370.

[7] See *ante*, pp. 78, 83; and *Wigglesworth* v. *Dallison* (1779), 1 Smith's L. C., 11th ed., 545.

parties,[1] or to prove oral agreements collateral to the written contract if they do not contradict it.[2]

Some kinds of contract are required by statute to be in writing. Where any such statute applies, it is clear that all the material terms of the contract must be set out in the writing.[3]

The first of these statutes was the Statute of Frauds, passed, as the preamble states, "for prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury."[4]

This statute requires that certain contracts therein specified shall be in writing, or shall be evidenced by some note or memorandum in writing, signed by the party to be charged therewith. It must be borne in mind, however, that the Statute of Frauds "is a weapon of defence not offence," and does not make any signed instrument a valid contract by reason of the signature, "if it is not such according to the good faith and real intention of the parties."[5]

Those portions of the Act which relate to parol conveyances of land, leases and assignments, to nuncupative wills, devises, declarations of trust and other matters which fall outside our subject, are here omitted. Later on in this chapter[6] we shall deal with contracts for the sale of goods, and section 4, sub-section 1, of the Sale of Goods Act, 1893,[7] which has been substituted for section 17 of the Statute of Frauds. We have here to consider only the fourth section of the Statute of Frauds, which enacts that "No action shall be brought,

> whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or,
>
> whereby to charge the defendant upon any special

[1] See *Filby* v *Hounsell*, [1896] 2 Ch. 737; *Plant* v. *Bourne*, [1897] 2 Ch. 281.
[2] See *Erskine* v. *Adeane* (1873), L. R. 8 Ch. at p. 766; *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215.
[3] See *Rossiter* v. *Miller* (1878), 3 App. Cas. 1124, 1147.
[4] 29 Car. II. c. 3.
[5] *Per cur.* in *Jervis* v. *Berridge* (1873), L. R. 8 Ch. at p. 360; and in *Hussey* v. *Horne-Payne* (1879), 4 App. Cas. at p. 323.
[6] *Post*, p. 702.
[7] 56 & 57 Vict. c. 71.

promise to answer for the debt, default or miscarriages of another person; or,

to charge any person—upon any agreement made upon consideration of marriage; or,

upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or,

upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." There are thus five distinct classes of contracts, in regard to which the agreement must be in writing in a certain form.

The note or memorandum in writing need not contain the whole of the terms, but must sufficiently set out all the material terms. What terms will be held material depends upon the circumstances of each particular case;[1] but the memorandum must at the very least name or unmistakably identify the parties to and the subject-matter of the contract and the consideration for it.[2]

Since the Mercantile Law Amendment Act, 1856,[3] it is no longer necessary, as far as guarantees are concerned, that the consideration for them should be stated therein. In all other cases "it seems necessary for effectuating the object of the statute that the consideration should be set down in writing as well as the promise; for otherwise the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise by turning that into an absolute promise which was only a conditional one: and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the Act to exclude, by requiring that the agreement should be reduced into writing,

[1] See *Fitzmaurice* v. *Bayley* (1857), 9 H. L. Cas. 78. The memorandum or note must be a memorandum of an agreement complete at the time the memorandum is made: *Munday* v. *Asprey* (1880), 13 Ch. D. 855.

[2] *Williams* v. *Jordan* (1877), 6 Ch. D. 517. To this end a letter and its envelope may be taken together as one document: *Pearce* v. *Gardner*, [1897] 1 Q. B. 688. A party need not be named, if he is otherwise clearly identifiable from the memorandum: see *Jarrett* v. *Hunter* (1887), 34 Ch. D. 182 ("the owner"); *Carr* v. *Lynch*, [1900] 1 Ch. 613 ("the person who paid 50*l*.").

[3] 19 & 20 Vict. c. 97, s. 3.

by which the consideration as well as the promise would be rendered certain."[1]

The writing, then, must be complete and state all material terms of the contract. Several documents, moreover, which on the face of them are connected together by internal references (which may be supplemented by parol identification), may be put in evidence as constituting an agreement or a memorandum or note thereof, which will satisfy the requirements of the statute.[2] "The statute is not complied with unless the whole contract is either embodied in some writing signed by the party, or in some paper referred to in a signed document and capable of being identified by means of the description of it contained in the signed paper."[3]

This written agreement or memorandum need be signed only by "the party to be charged therewith." In *Laythoarp* v. *Bryant*,[4] the vendor of leasehold premises who had not signed the memorandum of sale was held entitled to sue the purchaser who had signed it. "It is said," observed Tindal, C. J., "that unless the plaintiff signs there is a want of mutuality. Whose fault is that? The defendant might have required the vendor's signature to the contract; but the object of the statute was to secure the defendant's." Again, a written proposal containing the terms of a projected contract, signed by the defendant and assented to orally by the plaintiff, will satisfy the fourth section of the statute;[5] so also will an oral acceptance of one of two alternative proposals which the defendant has written and signed.[6] The insertion in a letter of the defendants' name by their authorised agent has been held to be a signature sufficient to satisfy the statute.[7]

[1] *Per* Lord Ellenborough, C. J., in *Wain* v. *Warlters* (1804), 1 Smith, L. C., 11th ed., at p. 329.

[2] *Boydell* v. *Drummond* (1809), 11 East, 142.

[3] *Ridgway* v. *Wharton* (1857), 6 H. L. Cas. 238; cited in *Rossiter* v. *Miller* (1878), 3 App. Cas. at p. 1151. See *Oliver* v. *Hunting* (1890), 44 Ch. D. 205, where parol evidence was admitted to explain the circumstances under which a letter was written, and the evidence so admitted having connected the letter with a memorandum, the two were read together and held to constitute a sufficient memorandum within the Statute of Frauds.

[4] (1836), 2 Bing. N. C. 735, 743.

[5] *Smith* v. *Neale* (1857), 2 C. B. N. S. 67, recognised in *Peek* v. *North Staffordshire Ry. Co.* (1863), 10 H. L. Cas. 473, 542.

[6] *Lever* v. *Koffler*, [1901] 1 Ch. 543.

[7] *Evans* v. *Hoare*, [1892] 1 Q. B. 593.

The document must be signed, it need not be subscribed; a signature anywhere on it suffices, provided it governs every part of the instrument.[1]

We now come to the consequences resulting from non-compliance with these requirements. The section commences with the words "no action shall be brought;" it does not say that, in the event of non-compliance with the requirements of the section, the contract shall be void. This distinction may be material.[2]

First, as to "any special promise" by an executor or administrator "to answer damages out of his own estate." In order that an action may be maintainable against the personal representative upon such a promise, a writing signed by him or his agent must be produced in evidence, containing the promise and disclosing—not necessarily in express terms, but at all events by its tenor—the consideration upon which the promise is founded.[3] A proposal made and accepted in writing, which was not intended to operate as an unqualified promise, but to form a part only of a suggested arrangement which was not wholly acquiesced in by the other party, will not satisfy the statute.[4]

Where the plaintiff declared that the defendant's testator was indebted to a third party, who after the testator's death assigned the debt to the plaintiff and appointed him to receive it to his own use, and that the defendant in consideration that the plaintiff would accept the defendant as his debtor promised to pay it to the plaintiff, the consideration alleged was held to be insufficient to support the promise so as to charge the defendant personally. If, however, the promise had been in consideration of forbearance by the assignee of the debt to sue the executor, that would have been a valid consideration in law.[5]

Secondly, as to "any special promise to answer for the debt, default or miscarriages of another person." The most usual form of such a promise is a guarantee—a promise to answer for the payment of some debt, or the performance of

[1] *Caton* v. *Caton* (1867), L. R. 2 H. L. 127.
[2] *Leroux* v. *Brown* (1852), 12 C. B. 801. See *Jones* v. *Victoria Graving Dock Co.* (1877), 2 Q. B. D. at p. 323; *Adams* v. *Clutterbuck* (1883), 10 Q. B. D. 403; and *post*, p. 708.
[3] *Rann* v. *Hughes* (1778), 7 T. R. 350, n.
[4] *Hamilton* v. *Terry* (1852), 11 C. B. 954.
[5] *Forth* v. *Stanton* (1669), 1 Wms. Saund. 210.

some duty, in the event of the failure of another person, who is, in the first instance, liable for such payment or performance.[1]

The intention of the guarantor as to the period during which the guarantee is to be in force must be clearly expressed,[2] *e.g.*, the guarantor should say whether he means to be liable for future advances only, or for past as well as future advances. In the latter case, it is a "continuing" guarantee; the cause of action thereon arises as each item of an account (whether principal or interest) falls due and remains unpaid. The Statute of Limitations[3] begins to run in the guarantor's favour as to each item from that moment.[4]

The fourth section of the Statute of Frauds does not require the contract itself to be in writing, but merely a memorandum of it;[5] and a memorandum, properly signed, of a by-gone contract is sufficient to satisfy the Act. Therefore, if words be introduced into a paper signed by "the party to be charged," or if an alteration be made in it, the addition or alteration thus made may be considered as authenticated by the signature already on the instrument, provided it be plain that it was meant to be so authenticated.[6]

The special promise must, however, be founded on a good consideration, though it shall not "be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing or, by necessary inference, from a written document."[7]

The statute thus enables a plaintiff to give parol evidence of the consideration for a guarantee. But "a consideration expressed in writing formerly discharged two offices: it sustained the promise and might also

[1] See *Mallet* v. *Bateman* (1865), L. R. 1 C. P. 163. Compare *Wallace* v. *Gibson*, [1895] A. C. 354.
[2] *Nottingham Hide Co.* v. *Bottrill* (1873), L. R. 8 C. P. 694.
[3] 21 Jac. I. c. 16, s. 3.
[4] *Parr's Bank* v. *Yates*, [1898] 2 Q. B. 460.
[5] *In re Hoyle, Hoyle* v. *Hoyle*, [1893] 1 Ch. 84.
[6] *Bluck* v. *Gompertz* (1852), 7 Exch. 862.
[7] 19 & 20 Vict. c. 97, s. 3. And see *Birkmyr* v. *Darnell* (1704), 1 Smith, L. C., 11th ed., at p. 304.

explain it;" and now, "parol evidence, though it may supply the consideration, cannot go further and explain the promise." [1]

The object of the party seeking to avail himself of the guarantee is to charge the defendant upon his promise "to answer for the debt, default, or miscarriages of another." It has, therefore, no application where direct liability attaches to the guarantor, or where there has been an absolute transfer of liability to him from the original debtor. Where the individual whose debt is guaranteed ceases altogether, upon the so-called guarantee being given, to be liable, the transaction is not one which requires to be evidenced by writing within the Statute of Frauds. In *Birkmyr* v. *Darnell*,[2] the distinction between a direct and a collateral liability is thus illustrated: "If two come to a shop and one buys and the other, to gain him credit, promises the seller, 'If he does not pay you I will,' this is a collateral undertaking and void without writing by the Statute of Frauds. But if he says, 'Let him have the goods, I will see you paid,' this is an undertaking as for himself, and he shall be intended to be the very buyer and the other to act but as his servant."

In other words, the surrounding circumstances must be looked at in order to determine whether a particular transaction does or does not amount to a guarantee within the Statute of Frauds. It will be a question of fact; the jury must determine to whom the credit was given. If it appears that the credit was given to the defendant—that is, if the goods, &c., were really sold to him—the clause of the statute cannot apply. But if it appears that the person for whose use the goods were furnished is liable, and a sufficient promise in writing by the defendant to pay the debt is produced, the plaintiff will be entitled to recover, as the promise was collateral.

"If a man says to another, 'If you will at my request put your name to a bill of exchange, I will save you harmless,' that is not within the statute. It is not a responsibility for the debt of another. It amounts to a contract by one that if the other will put himself in a certain situation, the first will indemnify him against the consequences." [3] A contract of

[1] *Per cur.* in *Holmes* v. *Mitchell* (1859), 7 C. B. N. S. at p. 370; and see the remarks of Williams, J., in *Peek* v. *North Staffordshire Ry. Co.* (1863), 10 H. L. Cas. at p. 473.

[2] (1704), 1 Smith, L. C., 11th ed., 299; and see *Mountstephen* v. *Lakeman* (1871), L. R. 7 Q. B. 196, 202; (1874), L. R. 7 H. L. 17.

[3] *Per* Pollock, C. B., in *Batson* v. *King* (1859), 4 H. & N. at p. 740.

indemnity, which may be sued on though verbal, is to be distinguished from a guarantee.[1]

In the following cases it has been held or intimated by the Court that the statute would not apply:—

1. If A. agree to accept C., a debtor of B., as his debtor in lieu of B., such an arrangement clearly involves a transfer of liability from B. to C., and is very different from a guarantee by C. as surety of B.'s debt to A.[2]

2. The statute applies only to promises made to the person to whom another is already or is to become answerable. It must be a promise to be answerable for a debt of or a default in some duty by that other person towards the promisee.[3]

3. If A. undertake to B. that C. shall do a particular thing, no privity existing between B. and C., the liability assumed by A. will be direct, and not collateral.[4]

4. Where A., a *del credere* agent (that is to say, a man who for a special commission makes himself answerable for the debt or default of a customer [5]), undertakes to be responsible to B. for due payment of the purchase-money of goods to be sold through the agency of A., this undertaking does not fall within the statute, and need not be in writing: for, though the engagement thus entered into by A. may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given.[6] Such an agent does not guarantee the solvency of the third party, but only undertakes to indemnify his principal against his own inadvertence or misfortune, should he make contracts for him with persons unable or unwilling to perform them.

The clause applies, however, to promises to answer for the tortious default or miscarriage of another as well as for his breach of contract. Thus, where A. had, without leave, ridden the plaintiff's horse and caused his death, a promise by the defendant to pay the plaintiff the damage which he had sustained, in consideration of the plaintiff forbearing to sue A., was held to be void because not in writing.[7]

Where it is possible to base the cause of action not upon a special promise of the defendant which is within the letter of the statute, but upon injury done to the plaintiff by some misrepresentation on the part of the defendant, made in order to induce the plaintiff to contract with some third party, it will

[1] See *Harburg India Rubber Comb Co.* v. *Martin*, [1902] 1 K. B. 778; *In re Denton's Estate*, [1904] 2 Ch. 178.

[2] *Gull* v. *Lindsay* (1849), 4 Exch. 45.

[3] *Guild & Co.* v. *Conrad*, [1894] 2 Q. B. 885; and see *In re Hoyle*, [1893] 1 Ch. 98.

[4] *Hargreaves* v. *Parsons* (1844), 13 M. & W. 561.

[5] See *post*, p. 847.

[6] *Couturier* v. *Hastie* (1852), 8 Exch. 40 (afterwards reversed on other grounds: 5 H. L. Cas. 673). See *Sutto* v. *Grey*, [1894] 1 Q. B. 285; *Harburg India Rubber Comb Co.* v. *Martin*, *supra*.

[7] *Kirkham* v. *Marter* (1819), 2 B. & Ald. 613.

be well to do so; because evidence of such misrepresentation when oral only (and therefore insufficient to support an action for breach of contract), can be relied upon to sustain an action of tort.[1]

It was to remedy the inconvenience resulting from the framing of actions in this manner that Lord Tenterden introduced into the statute, 9 Geo. IV., c. 14, the 6th section, which enacts that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

The requirements of this section will be satisfied if a false representation in writing be made which substantially contributed to the damage complained of, although an oral representation by the defendant may in part have contributed to it.[2] When an agreement is of such a kind that it must be in writing, it is quite clear that when so written it cannot afterwards be varied or altered orally, for otherwise the manifest intentions of the Legislature might be thwarted. It will be observed that the writing must be "signed by the party to be charged therewith" himself; a signature by an agent will be insufficient.[3]

Thirdly, as to "any agreement made upon consideration of marriage," we need only note that these words do not apply to a promise to marry, but merely to contracts for the performance of collateral acts in consideration of marriage.[4]

Fourthly, as to "any contract or sale of lands, tenements, and hereditaments, or any interest in or concerning them." Under certain circumstances, where there has been part

[1] *Pasley* v. *Freeman* (1789), 2 Smith, L. C., 11th ed., 66.
[2] *Tatton* v. *Wade* (1856), 18 C. B. 371.
[3] *Swift* v. *Jewsbury* (1874), L. R. 9 Q. B. 301; *Hirst* v. *West Riding Union Banking Co.*, [1901] 2 K. B. 560.
[4] *Hammersley* v. *Baron de Biel* (1845), 12 Cl. & F. 45; *Ungley* v. *Ungley* (1877), 5 Ch. D. 887 (see *post*, p. 697); *Johnstone* v. *Mappin* (1891), 60 L. J. Ch. 241; *In re Fickus*, *Farina* v. *Fickus*, [1900] 1 Ch. 331.

performance of such a contract, equity will disregard the statutory requirements and let in parol evidence of the contract. Though the existence of such a principle has never been in dispute, the decisions have been very conflicting as to what will amount to part performance sufficient to take the case out of the statute.[1] The general rule is that the acts relied on "must be such as could be done with no other view or design than to perform the contract."[2] "They must be unequivocally referable to the agreement."[3] Payment of part, or even of the whole, of the purchase-money, is not a sufficient part performance of the contract to exclude the operation of the statute;[4] on the other hand, the admission of the plaintiff into possession of land, to which he had previously no title, is as a rule a sufficient part performance; for the only possible explanation is that it is the result of a contract.[5] The continuance, however, in possession of a tenant is not necessarily a sufficient part performance of a parol agreement for the purchase of the land from the landlord, for it is equally consistent with the continuance of his tenancy.[6] Payment of an increased rent,[7] or the making of alterations and improvements on the part of the vendors at the purchaser's request,[8] would be sufficient to exclude the statute.

Thus, where a father verbally promised to give his daughter a house as a wedding present, and immediately after her marriage put her and her husband into possession, it was held that, as the promise was clear, the possession took the case out of the statute.[9] Again, where the defendant orally agreed with the plaintiff for the occupation of a certain piece of waste ground for three successive bank holidays at a fixed price, and entered on the ground on the first of three bank holidays, and paid the agreed rent, it was held,[10] when the defendant refused to occupy the land

[1] See the judgment of Lord Selborne in *Alderson* v. *Maddison* (1883), 8 App. Cas. at pp. 474—476; and *McManus* v. *Cooke* (1887), 35 Ch. D. 681.
[2] *Per* Lord Hardwicke, L. C., in *Gunter* v. *Halsey* (1739), Ambler, at p. 586.
[3] *Per* Baggallay, L. J., in *Alderson* v. *Maddison* (1881), 7 Q. B. D. at p. 178.
[4] See the remarks of Brett, L. J., in *Humphreys* v. *Green* (1882), 10 Q. B. D. at p. 160.
[5] See *Hodson* v. *Heuland*, [1896] 2 Ch. 428.
[6] *Fabian* v. *Nunn* (1865), L. R. 1 Ch. 35; *Thursby* v. *Eccles* (1900), 70L. J. K. B. 91.
[7] *Fabian* v. *Nunn*, *suprà*; *Miller & Aldworth, Ltd.* v. *Sharp*, [1899] 1 Ch. 622.
[8] *Dickinson* v. *Barrow*, [1904] 2 Ch. 339.
[9] *Ungley* v. *Ungley* (1877), 5 Ch. D. 887.
[10] *Smallwood* v. *Sheppards*, [1895] 2 Q. B. 627.

for the two other days, that the statute afforded him no defence to an action for the balance of the rent.

The words "lands, tenements, or hereditaments" in the statute were, no doubt, intended by the Legislature to mean the fee simple, and the words "any interest in or concerning them" to denote a chattel interest or some interest less than the fee simple. A great variety of interests in land have been held to fall within the statute. Thus, the statute applies to an agreement to convey an equity of redemption ;[1] a contract under which the plaintiff, in consideration of a sum of money, agrees to surrender his tenancy, and to procure the defendant to be accepted in his place ;[2] a contract to assign partnership assets including land,[3] or to sell the building materials of a house standing on land ;[4] a contract for the acquisition of a lease of realty ;[5] a contract to advance money on the security of land ;[6] a contract to let furnished lodgings ;[7] provided that the executory contract if executed would have conferred such an interest or property in land as to give a right to maintain a possessory action.[8] And a contract, whereby the plaintiff agrees to let a house to the defendant, to sell him certain furniture and fixtures therewith, and to make certain alterations and improvements therein, the defendant on his part agreeing to take the house and to pay for the furniture, fixtures and alterations, is within the statute.[9] So, where A., who was a tenant of certain premises for the residue of a term of years, agreed to sub-let them to B. for the residue of the term in consideration of B.'s paying a sum of money towards the dilapidations, this was held to be within the Act.[10] So, too, a grant of a right to shoot over land and take away a part of the game killed is a grant of an interest in land within the statute.[11] Where, indeed, anything is done which substantially amounts to a parting with an interest in land, or which relates to the sale of such an interest, the agreement is within the statute.[12] A contract for investigating the title to land, and a contract to sell trees which are blown down and severed from the soil,[13] have been held not to be within the statute ;[14] also a contract for the sale of shares in a railway company,[15] or a waterworks company,[16] or in a cost-book mining company.[17] A contract to sell debentures which are expressed to be a charge on all the property of a company, which property, at the

[1] *Massey* v. *Johnson* (1847), 1 Exch. 241.
[2] *Cocking* v. *Ward* (1845), 1 C. B. 858.
[3] *Gray* v. *Smith* (1889), 43 Ch. D. 208.
[4] *Lavery* v. *Pursell* (1888), 39 Ch. D. 508.
[5] *Horsey* v. *Graham* (1869), L. R. 5 C. P. 9 ; *Zimbler* v. *Abrahams*, [1903] 1 K. B. 577.
[6] *Mounsey* v. *Rankin* (1885), 1 C. & E. 496.
[7] *Inman* v. *Stamp* (1815), 1 Stark. N. P. C. 12.
[8] See the remarks of Blackburn, J., in *Wright* v. *Stavert* (1860), 2 E. & E. at p. 729.
[9] *Vaughan* v. *Hancock* (1846), 3 C. B. 766.
[10] *Buttemere* v. *Hayes* (1839), 5 M. & W. 456.
[11] *Webber* v. *Lee* (1882), 9 Q. B. D. 315.
[12] *Kelly* v. *Webster* (1852), 12 C. B. 283, 290.
[13] *Jeakes* v. *White* (1851), 6 Exch. 873.
[14] *In re Ainslie* (1885), 30 Ch. D. 485.
[15] *Bradley* v. *Holdsworth* (1838), 3 M. & W. 422.
[16] *Bligh* v. *Brent* (1836), 2 Y. & C. 268.
[17] *Watson* v. *Spratley* (1854), 10 Exch. 222 ; see the remarks of Maule, J. in *Toppin* v. *Lomas* (1855), 16 C. B. at p. 161.

time the contract is made and at the time the debentures were issued, includes certain leaseholds, is a contract within the section.[1] But the section does not apply unless the sale of land or of some interest in or concerning land is, by the terms of the contract, dealt with as part of the contract.[2]

Where a special agreement entered into between plaintiff and defendant is not sufficiently evidenced by writing to satisfy the Statute of Frauds, the facts of the case may nevertheless be such as to entitle the plaintiff to claim compensation or to recover back money paid as on a failure of consideration.[3]

Things annexed to land according to our law become part of the soil and are subjected to the same incidents as the soil itself. We shall refer, firstly, to the growing produce of land, such as crops, fruit, and the like; and secondly, to fixtures.

Lord Coke carefully distinguished between land and the growing produce of the land. Upon the death of a tenant for life, although the land belonged to the reversioner, the growing crops went to the executor of the tenant for life as part of his personal estate.[4] So, if a man were seised of land in right of his wife, and sowed the ground and died, his executors should have the corn; but if his wife died before him, he should have it; for, although upon the death of the husband or wife the interest of the former in the land ceased, yet the growing corn was considered as part of his personal estate and belonged to him or his executors.

Thus, it has been held that a sale of any growing produce of the earth, reared by labour and expense, such as a crop of potatoes, in actual existence at the time of the contract whether it be in a state of maturity or not, is not a sale of an interest in or concerning land, but a contract for the sale of goods.[5] But growing grass does not come into such a category, and therefore goes to the heir and not to the executor, and cannot be taken in execution under a writ of *fieri facias*.[6] The same rule applies to growing

[1] *Driver* v. *Broad*, [1893] 1 Q. B. 744.
[2] See *Boston* v. *Boston*, [1904] 1 K. B. at p. 127.
[3] *Pulbrook* v. *Lawes* (1876), 1 Q. B. D. 284.
[4] Co. Litt. 55 b.
[5] See the remarks of Littledale, J., in *Evans* v. *Roberts* (1826), 5 B. & C. at pp. 840, 841.
[6] *Crosby* v. *Wadsworth* (1805), 6 East, 602; and see *Parker* v. *Staniland* (1809), 11 East, 362.

fruit[1] and to growing trees,[2] unless, indeed, it clearly appear from the terms or nature of the particular contract that the parties to it were dealing exclusively with the produce of the trees, when they should be cut down and severed from the freehold.[3]

Tenants' fixtures attached to, but not parcel of, the freehold bear a very strong resemblance to those growing crops which are not the spontaneous produce of the earth, but are raised by the labour and expense of the occupier of the land. Even whilst thus attached they may be treated for some purposes as chattels;[4] for instance, in some cases they may be seized and sold in execution under a writ of *fieri facias*,[5] and will go to the executor. On the other hand, an action will not lie for tenants' fixtures before severance, nor can they be treated as goods sold and delivered in an action for their price.[6] It is clear that a contract concerning an interest in land and fixtures must be in writing; but, when things annexed to the freehold are sold in contemplation of an immediate severance and the contract does not transfer any interest whatever in the soil or freehold (*e.g.*, between an outgoing tenant at the expiration of his term and the incoming tenant under a new demise), or wherever the subject of the contract is in the view of the parties a mere chattel (as where fixtures have been appraised and valued under an oral agreement for their sale), it may reasonably be contended that the Statute of Frauds does not apply.[7]

If, however, an entire agreement be made for the sale of real and personal estate, and the agreement as to the land be within the statute and void, it cannot be supported as to the personal property which was sold with it.

Fifthly, as to "any agreement that is not to be performed within the space of one year from the making thereof." If the agreement in question is to be performed upon a contingency, but is not expressly to be performed after the year, a note in writing is not necessary, as the contingency might happen within the year. But where it appears by the whole tenor of the agreement that it is to be performed after the expiration of the year, the agreement or a note of it must be in writing.[8] The "space of one year" dates as from the making of the agreement.[9] The statute applies to such con-

[1] *Rodwell* v. *Phillips* (1842), 9 M. & W. 501.

[2] *In re Ainslie, Swinburn* v. *Ainslie* (1885), 30 Ch. D. 485; *In re Harrison, Harrison* v. *Harrison* (1884), 28 Ch. D. 220.

[3] *Marshall* v. *Green* (1875), 1 C. P. D. 35, 40, 44; and see the remarks of Chitty, J., in *Lavery* v. *Pursell* (1888), 39 Ch. D. at pp. 515—7. Emblements are now included in "goods" under the Sale of Goods Act, 1893 (see ss. 4 (1), 62).

[4] See the judgment of the Court in *Hallen* v. *Runder* (1834), 1 Cr. M. & R. at p. 275.

[5] *Poole's Case* (1703), 1 Salk. 368.

[6] *Lee* v. *Risdon* (1816), 7 Taunt. 188.

[7] *Lee* v. *Gaskell* (1876), 1 Q. B. D. 700.

[8] *Peter* v. *Compton* (1693), 1 Smith, L. C., 11th ed., 316; *Boydell* v. *Drummond* (1809), 11 East, 142; *Eley* v *Positive Assurance Co.* (1876), 1 Ex. D. 88.

[9] *Smith* v. *Gold Coast Co.*, [1903] 1 K. B. 285, 538.

tracts only as are not to be performed on either side within the year.[1]

Hence a contract for the maintenance of a child for "so long as the defendant shall think proper," was held not to be within the statute.[2] On the other hand, a contract for a year's service to commence at a future day is within the statute as being an agreement not to be performed within the year.[3] So, too, a contract for service for more than a year subject to determination within the year upon the happening of a given event must be in writing.[4] Moreover, if it appears from the nature of the contract that its performance was not contemplated within the year, the mere circumstance that it is defeasible within the year will not take it out of the operation of the statute.[5]

Where the defendant had verbally promised to pay the plaintiff—a woman, by whom he had had seven illegitimate children—£300 a year by equal quarterly instalments for so long as she should maintain and educate the children, the Court of Exchequer held that no writing was necessary, as such a promise was not one "not to be performed within a year from the making thereof." This was affirmed on appeal, but on the ground that the plaintiff was entitled to recover as for "money paid at the defendant's request." [6]

If the whole of what the plaintiff has to do as the consideration for the defendant's promise is capable of being performed within a year, and no part of it is intended to be postponed until after the expiration of the year, the agreement is not within the section, although the performance by the defendant of his part of the agreement is or may be extended beyond that period.[7] And where by the terms of a contract one party can perform his part of it within a year, a subsequent request by the other party that such performance should be postponed until after a year will not, if acceded to, bring the case within the section.[8]

As a general rule a contract of sale may be made in writing either with or without seal, or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties. All contracts for the sale of goods, when "not to be performed within the space of one year from the making thereof," are of course within the operation of section 4 of the Statute of Frauds. Contracts for the sale of

[1] *Donellan* v. *Read* (1832), 3 B. & Ad. 899; *Miles* v. *New Zealand Alford Estate Co.* (1886), 32 Ch. D. 266, 276, 296.

[2] *Souch* v. *Strawbridge* (1846), 2 C. B. 808.

[3] *Bracegirdle* v. *Heald* (1818), 1 B. & Ald. 722; and *post*, p. 854, 855. See *Britain* v. *Rossiter* (1879), 11 Q. B. D. 123 (where it was said that the equity of part-performance does not extend, and ought not to be extended, to contracts concerning any other subject-matter than land).

[4] *Dobson* v. *Collis* (1856), 1 H. & N. 81.

[5] *McGregor* v. *McGregor* (1888), 21 Q. B. D. 424.

[6] *Knowlman* v. *Bluett* (1873), L. R. 9 Ex. 1; (1874), L. R. 9 Ex. 307.

[7] *Smith* v. *Neale* (1857), 2 C. B. N. S. 67.

[8] *Bevan* v. *Carr* (1885), 1 C. & E. 499.

goods for the price of £10 or upwards fall within section 4 of the Sale of Goods Act, 1893,[1] which embodied and repealed section 17 of the Statute of Frauds and section 7 of Lord Tenterden's Act.[2] This section enacts that "a contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action, unless the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

It repeats section 17 of the Statute of Frauds almost word for word, substituting "value" for "price"[3] and "enforceable by action" for "allowed to be good" and making a few other alterations which do not call for any remark. Sub-section 2 runs:—"The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery." This brings executory contracts within the provisions of the section, and so makes the same formalities necessary as in the case of executed contracts, exactly as the repealed section of Lord Tenterden's Act had done.

In order, therefore, to show a good cause of action on a contract for the sale of goods of the value of £10 or upwards, the plaintiff must prove either—

(i.) An acceptance and actual receipt of part of the goods, or

(ii.) A part payment, or

(iii.) A note or memorandum of the contract duly signed.

(i.) "There is an acceptance within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not."

Thus, if the defendant bought wheat by sample and, after opening some of the sacks, rejected the wheat as not up to sample, his act in so doing

[1] 56 & 57 Vict. c. 71.

[2] 9 Geo. IV. c. 14. This Act was passed to extend the necessity for writing to contracts, the subject-matter of which did not exist at the time of contracting or was to be delivered afterwards.

[3] Cf. *Harman* v. *Reeve* (1856), 25 L. J. C. P. 257.

[4] 56 & 57 Vict. c. 71, s. 4, sub-s. 3.

would be one which recognised a pre-existing contract of sale.[1] Where a purchaser received goods and took and examined samples therefrom, these were held to be "acts" of the kind to which the statute refers.[2] So, also, where the purchaser received goods and kept them for a month and, without inspecting them or taking samples from them, tried to resell them, using for the purpose a sample given by the original seller.[3]

"All that is necessary is an acceptance which could not have been made except upon admission that there was a contract, and that the goods were sent to fulfil that contract."[4]

"The statute says that the contract shall not be good unless, among other alternative requisites, there has been an acceptance and actual receipt of some part of the goods. Having regard to the mischiefs at which the statute was aimed, it would appear a natural conclusion that the acceptance contemplated by the statute was such a dealing with the goods as amounts to a recognition of the contract."[5]

Besides an acceptance, there must also be an actual receipt of, at any rate, part of the goods. Now a receipt implies delivery, which may be actual or constructive; the statutory words "actual receipt" signify "delivery of the possession of the goods on behalf of the vendor to the vendee, and the receipt of the possession by the vendee."[6] A "constructive receipt" may of course be evidenced in very many different ways. "Where goods are ponderous and incapable of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other *indicia* of property."[7] Indeed, "the larger the bulk of the goods, the more impracticable it is that there should be a manual receipt; something there must be in the nature of constructive receipt, as there is constructive delivery."[8] If, however, there be no delivery, either actual or constructive, there can be no receipt. Suppose, for instance, that after negotiations have taken place for the sale of goods, some act remains to be done

[1] See *Page* v. *Morgan* (1885), 15 Q. B. D. 228 (but this was before the Sale of Goods Act).
[2] *Abbott* v. *Wolsey*, [1895] 2 Q. B. 97. But see *Taylor* v. *Smith*, [1893] 2 Q. B. 65.
[3] *Taylor* v. *G. E. Ry. Co.*, [1901] 1 K. B. 774.
[4] *Per* Brett, M. R., in *Page* v. *Morgan* (1885), 15 Q. B. D. at p. 230.
[5] *Per* Bowen, L. J., *ib.*, at p. 233.
[6] *Per cur.* in *Farina* v. *Home* (1846), 16 M. & W. at p. 123; cited by Crompton, J., in *Castle* v. *Sworder* (1861), 6 H. & N. at p. 838.
[7] *Per* Lord Kenyon, C. J., in *Chaplin* v. *Rogers* (1800), 1 East, at pp. 194, 195.
[8] *Per* Williams, J., in *Bushel* v. *Wheeler* (1844), 15 Q. B. at p. 445.

by the purchaser, which must necessarily precede delivery, such as the selection and marking of growing timber; until this is done, there can be no delivery to, and consequently no receipt by, the purchaser.[1]

(ii.) With regard to earnest and part payment it has been held that there must be an actual payment of money by the purchaser to the vendor, or if no money passes, there must be an actual discharge or extinguishment of some debt due from the latter to the former.[2] Though an agreement to set off a claim of the buyer against a part of the price may amount to part payment,[3] the statute is not satisfied by the mere appropriation of a debt from seller to buyer, or of money in the seller's hands which belongs to the buyer.[4] Earnest consists of any coin or thing of value given in token of the bargain, but which is not, as a rule, part of the price.[5]

(iii.) If the plaintiff cannot thus prove either an acceptance and actual receipt of part of the goods, or a part payment, he cannot succeed without some "note or memorandum in writing" such as the Statute of Frauds required.

The effect, therefore, of this section of the Sale of Goods Act is that, although where the value of the goods amounts to £10 or upwards the law regards a written memorandum of the bargain as of primary importance, it will dispense with such evidence where by mutual consent there has been part performance of the contract. Where the buyer has paid any part of the price, however small, or has accepted and actually received any part of the goods, however small, the necessity of giving written evidence of the contract is waived and it may be established by oral evidence.[6] Where a party sues upon a contract falling within the 17th section of the Statute of Frauds, he must be prepared to show a good contract actually in existence at the time of action brought; and to make it a good contract under the statute, it must comply

[1] *Acraman* v. *Morrice* (1849), 8 C. B. 449.
[2] *Blenkinsop* v. *Clayton* (1817), 7 Taunt. 597.
[3] See *Walker* v. *Nussey* (1847), 16 M. & W. at p. 305.
[4] *Norton* v. *Davison*, [1899] 1 Q. B. 401.
[5] See *Howe* v. *Smith* (1884), 27 Ch. D. at pp. 101, 102.
[6] See *Morton* v. *Tibbett* (1850), 15 Q. B. at pp. 433, 434

with one of the three alternative requisites. A written memorandum or part payment after action brought will not be sufficient to satisfy the statute;[1] but it need not be made at the time of the contract, provided it be made before action brought.[2]

This note or memorandum in writing must give with sufficient certainty the terms of the contract actually made;[3] for instance, a letter from the plaintiff to the defendant, together with the answer to it, would constitute a sufficient memorandum in writing, if all the material terms of the contract specifically agreed to were expressed in the correspondence;[4] and it must, of course, be proved that the contract evidenced by the memorandum was that really concluded between them.[5] Where a contract in writing sufficient within the Statute of Frauds was afterwards altered by a verbal agreement, such new agreement was held to be invalid for any purpose, either as establishing a new contract or as rescinding the old one by implication.[6] Further, it has been held that the price of goods sold or contracted for, if settled, must appear in the memorandum of their bargain;[7] whereas, if no particular price had been stipulated for, it would suffice to put down in writing the terms of the contract really concluded.[8] The names of both parties to the contract (or some sufficient description to identify them) must appear in the note or memorandum, or in some writing sufficiently connected with it;[9] but the signature of the party "to be charged" upon the contract, though appended to a separate letter or document referring to and recognising the contract, will be sufficient to satisfy the statute.[10] The original contract, if in writing, signed by both parties, whilst unrescinded

1 *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357.
2 *Bill* v. *Bament* (1841), 9 M. & W. 36; *Saunderson* v. *Jackson* (1800), 2 Bos. & Pul. 238.
3 *Per* Lord Abinger, C. B., in *Johnson* v. *Dodgson* (1837), 2 M. & W. at p. 659.
4 *Bailey* v. *Sweeting* (1861), 30 L. J. C. P. 150; *Wilkinson* v. *Evans* (1866), L. R. 1 C. P. 407.
5 *Moore* v. *Campbell* (1854), 10 Exch. 323.
6 *Noble* v. *Ward* (1866), L. R. 1 Ex. 117; (1867), L. R. 2 Ex. 135.
7 *Elmore* v. *Kingscote* (1826), 5 B. & C. 583; and see *Cox* v. *Hoare* (1907), 96 L. T. 719.
8 *Hoadly* v. *M'Laine* (1834), 10 Bing. 482.
9 See *Sarl* v. *Bourdillon* (1856), 1 C. B. N. S. 188.
10 See the remarks of Patteson, J., in *Sievewright* v. *Archibald* (1851), 17 Q. B. at p. 114; and see *Leather Cloth Co.* v. *Hieronimus* (1875), L. R. 10 Q. B. 140.

has been held to be the binding instrument, so that no subsequent memorandum signed by one party only can have any effect.

The signature to the "note or memorandum in writing" may be that of the "agent in that behalf" of the party to be charged. These words would include such agents as a traveller employed by a mercantile firm, an auctioneer, or a broker, provided that they are acting within the scope of their authority in signing.[1]

On the sale of goods by auction, the auctioneer usually acts as agent both for the buyer and for the seller;[2] though he may in some exceptional cases render himself personally liable on the contract.[3] The assent of both parties is, however, necessary to make the contract binding; assent is signified on the part of the seller by the fall of the hammer, on the part of the purchaser by bidding. A bidder has a *locus pœnitentiæ*, and may retract his bidding before the hammer falls; and, on the other hand, the owner of the chattel put up for sale may at any time before the contract is complete revoke the auctioneer's authority.[4] Whether he is agent for both parties or not will depend upon the facts of the particular case. An auctioneer properly complies with the requirements of the statute if, on a public sale of goods to the amount of £10 or upwards, he writes down in his sale book (containing a copy of the conditions of sale) the Christian name and surname of the highest bidder as purchaser, and also the amount of the purchase-money opposite to the lot purchased.[5] When the auctioneer, or his clerk acting under his direction,[6] thus signs for the purchaser, the statute is satisfied, because there is "a note or memorandum in writing" of the "bargain," signed by the lawfully authorised agent of the vendee, the authority to sign having been expressly given on behalf of the purchaser by bidding. Clearly, in this case, the contract between the parties is constituted by the conditions of sale and description of the lot, and cannot at the time of sale be varied by any oral statement of the auctioneer.[7] If any alteration be required in the conditions or particulars, such alteration should be made in writing before the sale of the lot in question has commenced. Moreover, as soon as the sale by auction has taken place, and the deposit-money has been paid, the authority of the auctioneer is, as a rule, at an end. Hence, if any of the goods sent for sale be not sold at the auction,

[1] *Sharman* v. *Brandt* (1871), L. R. 6 Q. B. 720; and see *post*, pp. 846, 847.
[2] *Sims* v. *Landray*, [1894] 2 Ch. 318; *Van Praagh* v. *Everidge*, [1903] 1 Ch. 434.
[3] *Woolfe* v. *Horne* (1877), 2 Q. B. D. 355.
[4] *Warlow* v. *Harrison* (1859), 1 E. & E. 295.
[5] *Kenworthy* v. *Schofield* (1824), 2 B. & C. 945; *Peirce* v. *Corf* (1874), L. R. 9 Q. B 210, 215, 217.
[6] *Bird* v. *Boulter* (1833), 4 B. & Ad. 443. But the clerk cannot bind the purchaser without his express consent: *Sims* v. *Landray*, [1894] 2 Ch. 318.
[7] *Gunnis* v. *Erhardt* (1789), 1 H. Bl. 290. See *In re Hare and O'More's Contract*, [1901] 1 Ch. 93.

any subsequent sale must be treated as one by private contract, and a written agreement should be prepared accordingly and signed by the principals themselves. "No doubt an auctioneer at the sale is agent for both seller and buyer, so as to bind them by his signature; but the moment the sale is over the same principle does not apply, and the auctioneer is no longer the agent of both parties, but of the seller only, and the signature of the seller or his agent cannot bind the buyer."[1] The same rule applies where any alterations are made in the conditions of sale after the property has been knocked down.[2] One of the parties to a sale of goods of the price of £10 or upwards cannot act as an agent for the other party so as to bind him under the statute by signing for him a memorandum of the sale;[3] an auctioneer, therefore, when plaintiff in an action for the price of goods sold by him at auction, is precluded from availing himself of his own signature of the defendant's name in his sale book as a compliance with the statute;[4] though, where the signature in question was entered in the sale book by the auctioneer's clerk in the sight of all parties, it was held sufficient.[5]

A broker is an agent employed to make bargains and contracts between third persons in matters of trade, commerce or navigation, for a pecuniary compensation called "brokerage" or "commission." He is "lawfully authorised" to bind his principal.[6] A broker who acts both for the vendor and for the purchaser of goods undoubtedly binds either of his principals by signing a note or memorandum in writing of the bargain concluded between them; though, if a party to the contract, the broker could not sign it as agent for the defendant.[7] He cannot sue in his own name on a contract made by him as broker.[8] By the practice of share-brokers and stockbrokers in the City of London, when a contract of sale is made through the medium of a broker, and is entered by the broker in his books and signed,[9] such an entry constitutes the contract and binds the parties; for he is authorised by the one party to sell, and by the other to buy. When the broker has reduced the transaction to writing and signed it as their common agent, it binds them both as if both had signed it with their own hands.

It is further the practice for the broker to send what are called the bought and sold notes to his principals—the bought note to the buyer, and the sold note to the seller—by way of intimating that he has acted upon their instructions. Frequently he sends these notes without entering or signing any contract in his book. If the notes agree, they are held to

[1] *Per* Pollock, C. B., in *Mews* v. *Carr* (1856), 1 H. & N. at p. 488.
[2] See *Sykes* v. *Giles* (1839), 5 M. & W. 645, 651; followed in *Williams* v. *Evans* (1866), L. R. 1 Q. B. 352.
[3] *Graham* v. *Musson* (1839), 5 Bing. N. C. 603.
[4] *Farebrother* v. *Simmons* (1822), 5 B. & Ald. 333.
[5] *Bird* v. *Boulter* (1833), 4 B. & Ad. 443; and see *Peirce* v. *Corf* (1874), 43 L. J. Q. B. 52, 54; and *Bell* v. *Balls*, [1897] 1 Ch. 663.
[6] *Thompson* v. *Gardiner* (1876), 1 C. P. D. 777. A broker cannot, however, delegate his authority without the consent of his principal.
[7] *Sharman* v. *Brandt* (1871), L. R. 6 Q. B. 720.
[8] *Fairlie* v. *Fenton* (1870), L. R. 5 Ex. 169.
[9] *Noble* v. *Ward* (1867), L. R. 2 Ex. 135. A broker signing in that character may by local usage incur liability as principal: *Pike* v. *Ongley* (1887), 18 Q. B. D. 708.

constitute a binding contract ; but if there is any material variance between them, they are both nullities and there is consequently, in the absence of part payment and part acceptance, no binding contract between the parties upon which an action could be brought.[1] For contracting parties must consent *ad idem ;* and where the terms of the two notes differ, there can be no *consensus* of agreement. A material alteration in the sold note made by the buyer without the knowledge or consent of the seller will prevent the former from suing on the contract.[2] But where the broker was employed by the seller alone, a contract, effected by a note sent to and accepted by the purchaser, was not avoided by a variation in the note sent to the seller.[3]

"The absence of a memorandum in writing, and of the other conditions mentioned in section 4(1) of the Sale of Goods Act, does not make a contract void or even voidable. The contract is good. The only effect of the non-fulfilment of the statutory conditions is that it is unenforceable. And, the contract being good, all the legal consequences of a contract follow ; so that, if the contract is for the sale of specific goods, the property in the goods passes to the buyer. It may be asked, What happens if the buyer, after making the purchase, refuses to fulfil any of the statutory conditions which alone will make the contract enforceable against him ? The property in the goods has passed to him, and it may be that he has received the goods themselves, yet he cannot be sued for the price. My answer is that the seller may call on the buyer to pay for the goods, and, if he fails to comply, the seller may treat the contract as rescinded. The effect of such rescission would be to revest the property in the seller and to entitle him to resume possession."[4]

[1] *Sievewright* v. *Archibald* (1851), 17 Q. B. 103. See *Caerleon Tin Plate Co.* v. *Hughes* (1891), 65 L. T. 118.
[2] *Mollett* v. *Wackerbarth* (1847), 5 C. B. 181.
[3] *McCaul* v. *Strauss & Co.* (1883), 1 C. & E. 106.
[4] *Per* Bigham, J., in *Taylor* v. *G. E. Ry. Co.*, [1901] 1 K. B. at pp. 778, 779.

## Chapter V.

### VOID AND VOIDABLE CONTRACTS.

Some contracts are void or voidable because of a defect in the capacity of the parties—for example, the contracts of infants discussed in the first chapter of this Book. Others are avoided because their subject-matter is such that the law discountenances actions brought upon them—for example, bets and certain kinds of money-lending transactions ; these are discussed in the next chapter. Other contracts, again, though lawfully made by persons of full capacity, become void or voidable through other influences, such as fraud, misrepresentation and mistake.

The consent of one or both parties to a contract may be given under such conditions as to make the consent unreal. Consent is unreal if procured by coercion or "duress." This may be either duress by threats which cause fear of loss of life or limb, or duress by imprisonment where a man actually loses his liberty.

"The law so much discourages unlawful confinement that, if a man under duress of imprisonment or compulsion by an illegal restraint of liberty seals a bond or the like, he may allege this duress and avoid the extorted bond. But if a man be lawfully imprisoned, and, either to procure his discharge or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it."[1] This is "duress of the person ;" it excludes consent.[2] It is more doubtful whether "duress of goods" would avoid a contract.[3] In cases "where goods are unlawfully detained, or an injurious act is about to be done to them, or if some act which it was the duty of a party to do in respect of them be refused to be done unless money be paid, and the money be paid under protest as the only means of avoiding the immediate injury which would result from the detainer, the injurious act or the wrongful refusal, the money so paid may be recovered back."[4] "Money extorted by

[1] 1 Bla. Com. 136.
[2] *Scott* v. *Sebright* (1886), 12 P. D. 21 ; *Ford* v. *Stier*, [1896] P. 1.
[3] See the remarks of Parke, B., in *Atlee* v. *Backhouse* (1838), 3 M. & W. at p. 650.
[4] *Per cur.* in *Glynn* v. *Thomas* (1856), 11 Exch. at pp. 878, 879.

duress of the plaintiff's goods, and paid by the plaintiff under protest, may be recovered in an action for money had and received."[1]

A contract made by a person under duress is voidable at his option. If the will of the contracting party is coerced, it does not matter whether the pressure be physical or moral.[2]

"The plaintiff extorted a contract from a wife by threats of criminal proceedings against her husband, if she did not comply : those proceedings being such that, if taken, they would probably have resulted in the ruin of the husband and the disgrace of his wife and children."[3] "Pressure, which amounted to torture, was applied in order to coerce the defendant into signing the contract."[4] The Court therefore refused to enforce the contract so procured. "An English Court will not help him to enforce it, whatever may be the law of the country in which the contract was made."[5]

A contract may be also rescinded if it has been obtained by any unconscientious use of power arising out of the circumstances and conditions of the contracting parties. Such a misuse of power is called "undue influence." Whenever "the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just and reasonable. . . . It is sufficient for the application of the principle, if the parties meet under any such circumstances as to give the stronger party dominion over the weaker; and such power and influence are generally possessed, in every transaction of this kind, by those who trade upon the follies and vices of unprotected youth, inexperience and moral imbecility."[6]

Catching bargains with heirs, reversioners, or expectants in the life of the father are thus tainted.[7] It is sufficient to show that the parties dealt on unequal terms and that the agreement was unfair; in this connection the youth of the

[1] *Per cur.* in *Wakefield* v. *Newbon* (1844), 6 Q. B. at p. 280; and see *Ashmole* v. *Wainwright* (1842), 2 Q. B. 837; *Green* v. *Duckett* (1883), 11 Q. B. D. 275.

[2] See *Kaufman* v. *Gerson*, [1904] 1 K. B. at p. 597.

[3] *Per* Romer, L. J., *ib.* at p. 599. (See the remarks of Bowen, L. J., in *Jones* v. *Merionethshire Permanent Building Society*, [1892] 1 Ch. at p. 186.)

[4] *Per* Mathew, L. J., *ib.* at p. 600.

[5] *Per* Collins, M. R., *ib.* at p. 598.

[6] *Per* Lord Selborne, L. C., in *Earl of Aylesford* v. *Morris* (1873), L. R. 8 Ch. at p. 491.

[7] See the learned judgment of Lord Hardwicke in *Chesterfield* v. *Janssen* (1751), 1 Atk. at p. 353; 1 White and Tudor's L. C., 7th ed., at p. 300.

victim and the absence of proper professional advice would be important.

The remedy was originally equitable; but every Court has now power, by the Moneylenders Act, 1900,[1] to re-open bargains where the interest charged is excessive and the transaction harsh and unconscionable. This new power is something more than the power formerly exercised in equity. "There are two cases contemplated by the Act—one where the interest is excessive and the transaction harsh and unconscionable; the other where the interest is excessive and the transaction is such that, without the necessity of proving the transaction to be harsh and unconscionable, a Court of Equity would give relief." [2]

No rule can be stated as to what will be considered "excessive interest;" in one case 75 per cent. was held a reasonable rate, and no relief was given.[3] There had been no misrepresentation or pressure on the part of the lender, as the borrower fully understood the transaction and voluntarily agreed to pay the interest demanded.

The undue influence may be parental,[4] spiritual,[5] or professional—as where a solicitor induced a married woman, who had no independent advice, to convey some of her property to his own son.[6] But if the undue influence be subsequently removed, and the agreement appears to have been confirmed by the subsequent conduct of the parties, the contract will stand.

Thus, where a patient made a gift to her doctor, and upheld the transaction after the confidential relation between the parties had ended, the gift was not disturbed.[7]

Apparently contracts of marriage are not avoided by fraud which merely induces consent, but by "fraud which procures the appearance, without the reality, of consent." [8] Disparity in the condition or fortune of the consenting party to a marriage does not affect the reality of the consent.[9]

[1] 63 & 64 Vict. c. 51, s. 1.
[2] *Per* Lord Macnaghten, in *Samuel* v. *Newbold*, [1906] A. C. at p. 469, following *In re A Debtor*, [1903] 1 K. B. 705.
[3] *Carringtons, Ltd.* v. *Smith*, [1906] 1 K. B. 79; and see cases cited there.
[4] *De Witte* v. *Addison* (1899), 80 L. T. 207; *Powell* v. *Powell*, [1900] 1 Ch. 243 (step-mother and step-daughter).
[5] See *Allcard* v. *Skinner* (1887), 36 Ch. D. 145; *Morley* v. *Loughnan*, [1893] 1 Ch. 736.
[6] *Willis* v. *Barron*, [1902] A. C. 271; and see *Wright* v. *Carter*, [1903] 1 Ch. 27.
[7] *Mitchell* v. *Homfray* (1881), 8 Q. B. D. 587; and see *Savery* v. *King* (1856), 5 H. L. Cas. 627.
[8] *Per* Sir F. H. Jeune, President, in *Moss* v. *Moss*, [1897] P. at p. 269.
[9] See cases cited, *ib.* at p. 269.

Fraud vitiates everything. Hence no contract obtained by fraud can be enforced against the party defrauded, although he may affirm it, if with full knowledge of the facts he chooses so to do. A contracting party, who has been the victim of fraud, may either—

(i.) apply to the Court to have the contract cancelled on that ground; or

(ii.) he may elect to affirm the contract and may demand its completion or else damages for non-completion; or

(iii.) he may bring an action for damages for deceit, and this even if he has lost his right to avoid or affirm the transaction by delaying too long.

"Contracts which may be impeached on the ground of fraud are not void, but voidable only at the option of the party who is or may be injured by the fraud; subject to the condition that the other party, if the contract be disaffirmed, can be remitted to his former state;"[1] the fraudulent party is bound by estoppel, if the defrauded party elects to affirm the contract. If a man makes a promise which he never means to fulfil, that is a fraudulent promise, and it entitles the defrauded promisee to rescind the contract[2]—unless, indeed, an innocent third party has meanwhile acquired rights under it. If goods sold under a fraudulent contract of sale are pledged the pledgee obtains a good title.[3] Or if a man be induced by fraud to take shares in a company, and the company is wound up before he can disaffirm the contract, he loses his right to rescind, for the position of the parties has been altered.[4] Apparently, "where one of two innocent parties must suffer from the fraud of a third, the loss should fall on the one who enabled the third party to commit the fraud."[5]

It is also a defence to any action brought on a contract that the plaintiff was guilty of fraud in procuring the defendant to enter into the contract. But it is no defence that the defendant was induced to enter into it by the fraud of some third person, if the plaintiff be innocent of all knowledge of or complicity in the fraud, and has obtained no

[1] *Per cur.* in *Urquhart* v. *Macpherson* (1878), 3 App. Cas. at pp. 837, 838.

[2] *Clough* v. *L. & N. W. Ry. Co.* (1871), L. R. 7 Ex. 26.

[3] *Babcock* v. *Lawson* (1879), 4 Q. B. D. 394; (1880), 5 Q. B. D. 284; see Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24 (2), *post*, p. 793.

[4] *Oakes* v. *Turquand* (1867), L. R. 2 H. L. 325; and see *In re General Railway Syndicate*, [1900] 1 Ch. 365.

[5] *Per cur.* in *Babcock* v. *Lawson* (1879), 4 Q. B. D. at p. 401; cf. the remarks of Ashurst, J., in *Lickbarrow* v. *Mason* (1794), 1 Smith, L. C., 11th ed., at pp. 701, 702. But the rule is not universal: see the remarks of Vaughan Williams, L. J., in *Farquharson* v. *King*, [1901] 2 K. B. at p. 712.

benefit thereby, and is neither the principal nor the agent of the fraudulent person.

Thus, where a defendant was induced by the fraud of a solicitor to execute a mortgage deed containing the usual covenants, and an action was subsequently brought against him on those covenants by a transferee of the mortgage, it was held that he could not successfully plead either the fraud of the solicitor, or that the deed was not his deed (*non est factum*).[1]

The essential elements of fraud in the sense now discussed are that there should be a misrepresentation which is false to the knowledge of the man who makes it; that it should be intended to induce the person to whom it is addressed to act in some way; and that the latter should be thereby deceived, and induced so to act, and should consequently suffer damage.

The fraudulent misrepresentation may be either by words or by conduct. It must have been made either with knowledge of its falsehood,[2] or with such reckless disregard as to its truth that the speaker must be held as responsible as if he had asserted what he knew to be untrue.[3] Mere carelessness in making statements does not found an action for deceit, unless there is a duty to be careful,[4] nor does "the passive acquiescence of the seller in the self-deception of the buyer."[5] "Mere non-disclosure of material facts, however morally censurable, would form no ground for an action for deceit or misrepresentation. There must be some active mis-statement of fact, or at all events such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false."[6]

Thus the sale of a glandered horse,[7] or of diseased pigs,[8] by a person knowing the defect gives no right of action to an ignorant buyer, who sustains damage in consequence. "The buyer knows of the possible existence of the defect, or he does not. On the former assumption he has

[1] *Howatson* v. *Webb*, [1907] 1 Ch. 537; [1908] 1 Ch. 1.
[2] *Dickson* v. *Reuter's Telegraph Co.* (1877), 3 C. P. D. 1; *Derry* v. *Peak* (1889), 14 App. Cas. 337.
[3] *Reese River Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 79; and see *Evans* v. *Edmonds* (1853), 13 C. B. at p. 786.
[4] See the remarks of Bowen, L. J., in *Low* v. *Bouverie*, [1891] 3 Ch. at p. 105; and *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491.
[5] *Per* Cockburn, C. J., in *Smith* v. *Hughes* (1871), L. R. 6 Q. B. at p. 603.
[6] *Per* Lord Cairns in *Peek* v. *Gurney* (1873), L. R. 6 H. L. at p. 403.
[7] *Hill* v. *Balls* (1857), 2 H. & N. 299, 305, 306.
[8] *Ward* v. *Hobbs* (1877), 4 App. Cas. 13.

no right of complaint if he chose to purchase without a warranty; on the latter assumption, he ought not to be any better off for his ignorance."[1]

To make a genuine statement of intention and afterwards to change one's mind is not actionable,[2] though a false expression of present intention may be so.[3] It has been held that a statement which is in fact true may amount to fraud, if intended to mislead;[4] if a statement might be understood either in a true or in a false sense, the plaintiff must prove it was meant to be believed in a false sense.[5] Apparently motive is unimportant. If the defendant knowingly made a false representation, it is immaterial that he really believed that it would subsequently become true, or that he acted for the best.[6] The fraud may consist of a number of statements (*e.g.*, in a company's prospectus), not in one specific statement only.[7]

In an action to set aside a contract on the ground that it was obtained by a misrepresentation made by the defendant, it is not enough for the plaintiff to prove merely that the defendant intended him to act upon the misrepresentation; he must also show that he was in fact misled by it.[8] It is no defence to say that the plaintiff could have found out the truth,[9] or that he was only in part induced by the falsehood.[10] But the "puffing" of goods by salesmen, perhaps because the buyer is supposed to discount it, can seldom found an action. The rule *caveat emptor* is of wide application.

The fraud of an agent, acting within the scope of his employment, makes both principal and agent liable.[11] But

[1] *Per* Bramwell, B., in *Hill* v. *Balls* (1857), 2 H. & N. at p. 306.

[2] *Chadwick* v. *Manning*, [1896] A. C. 231.

[3] *Clough* v. *L. & N. W. Ry. Co.* (1871), L. R. 7 Ex. 26; and see the remarks of Bowen, L. J., in *Edgington* v. *Fitzmaurice* (1885), 29 Ch. D. at p. 483.

[4] See *Gluckstein* v. *Barnes*, [1900] A. C. at p. 250.

[5] *Glasier* v. *Rolls* (1889), 42 Ch. D. 436.

[6] *Polhill* v. *Walter* (1832), 3 B. & Ad. 114; and see *Pasley* v. *Freeman* (1789), 2 Smith, L. C., 11th ed. 66.

[7] See the remarks of Lord Halsbury, L. C., in *Aaron's Reefs* v. *Twiss*, [1896] A. C. at p. 281. As to the liability of a director for misstatements contained in the prospectus of a company, see the Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 84, which re-enacts the provisions of the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64); see *ante*, pp. 550, 553.

[8] See the remarks of Cotton, L. J., in *Arkwright* v. *Newbold* (1881), 17 Ch. D. at p. 324.

[9] *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1; and see *Smith* v. *Land, &c., Corporation* (1884), 28 Ch. D. 7.

[10] *Reese River Mining Co.* v. *Smith* (1869), L. R. 4 H. L. 79.

[11] *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259. As to partners, see *Cleather* v. *Twisden* (1883), 28 Ch. D. 340; *Oppenheimer* v. *Frazer*, [1907] 2 K. B. 50; as to husband and wife, see *Earle* v. *Kingscote*, [1900] 2 Ch. 585; and *post*, Book VI.

fraud on the part of an agent for his private benefit, not for his principal's benefit, does not make the principal liable.[1] An agent, acting outside the scope of his employment, is liable himself, but does not make his principal liable either in tort or contract.[2] If an agent honestly makes a representation which his principal alone knows to be false, apparently neither can be sued for fraud, though the resulting contract might be avoided because of the material misrepresentation.[3]

Apart from fraud, the consent of a contracting party may have been procured by innocent mis-statements or by innocent withholding of information. Such innocent misrepresentation does not give rise to an action of deceit, though (like fraud) it may be a ground for rescinding the contract or for refusing specific performance of it.[4]

Sometimes, as for example in a lease, parties stipulate that if one party breaks certain conditions in the contract, the other party shall be entitled to rescind the whole transaction. So in less formal contracts the parties may make the existence of their agreement depend upon the truth of matters which are either expressed or assumed in it. Such statements or promises are preliminary stipulations or "conditions," which form the basis of the contract; if they prove to be untrue or are unfulfilled, the party to whom they are made is entitled to be discharged, if he wishes, from his liabilities under the contract. There may also be terms in a contract which do not actually go to the root of it; these are usually called "warranties" and, if broken, do not discharge the contract, but support an action for damage sustained through their non-fulfilment. The question whether a representation is vital to the contract or only subsidiary is a matter of interpretation according to the facts of each case.[5]

[1] *Ruben* v. *Great Fingall Consolidated*, [1906] A. C. 439.

[2] *Udell* v. *Atherton* (1861), 7 H. & N. 172.

[3] *Cornfoot* v. *Fowke* (1840), 6 M. & W. 358; *National Exchange Co. of Glasgow* v. *Drew* (1855), 2 Macq. H. L. Cas. 146; *Blackburn* v. *Vigors* (1887), 12 App. Cas. 531.

[4] See the judgment of Cotton, L. J., in *Arkwright* v. *Newbold* (1881), 17 Ch. D. at p. 320; *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1; and the judgment of Lord Bramwell in *Derry* v. *Peek* (1889), 14 App. Cas. at p. 347.

[5] As to the distinction between a condition and a warranty, see the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11, and *post*, pp. 786, 787.

Where by a charter-party it was agreed that the plaintiff's ship "now in the port of Amsterdam" should go to Newport and there load coals for Hong Kong, and it afterwards appeared that the ship was not then in Amsterdam and did not arrive there until four days after the date of the charter-party, it was held that the mis-statement was intended by the parties to be a condition, the breach of which discharged the defendant from the contract, and that he had therefore acted within his rights in refusing to load the ship when she arrived at Newport.[1]

It is difficult to define how far a party, who makes an innocent misstatement not amounting to a condition or a warranty, is to be taken to know that such a misstatement actually induces the contract. In certain kinds of agreements (known as contracts *uberrimæ fidei*) the amplest good faith is required between the parties; each is bound to tell the other everything that might affect his judgment. Such are:—

(i.) Contracts of insurance. In a contract of marine insurance there must be "no misrepresentation or concealment either by the insured or by anyone who ought, as a matter of business and fair dealing, to have stated or disclosed the facts to him or to the underwriter for him."[2] So also with fire and life assurance,[3] though life assurance differs in that it is not a mere contract of indemnity, but entitles the assured to receive the exact sum for which he has insured.[4] We shall deal more fully with insurance contracts in a later chapter.[5]

(ii.) Contracts for sale of land. In these, "where the misdescription, although not proceeding from fraud, is in a material and substantial point, so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether, and the purchaser is not bound to resort to the clause of compensation."[6] But commendatory

[1] *Behn* v. *Burness* (1862), 3 B. & S. 751.

[2] *Per* Lindley, L. J., in *Blackburn* v. *Vigors* (1886), 17 Q. B. D. at p. 578; and see the judgment in *Ionides* v. *Pender* (1874), L. R. 9 Q. B. at pp. 537, 538.

[3] *London Assurance Co.* v. *Mansel* (1879), 11 Ch. D. 363; *Joel* v. *Law Union, &c., Insurance Co.*, [1908] 2 K. B. 863.

[4] See *Dalby* v. *India, &c., Life Insurance Co.* (1854), 24 L. J. C. P. 1.

[5] See *post*, Chap. XV.

[6] *Per* Tindal, C. J., in *Flight* v. *Booth* (1834), 1 Bing. N. C. at p. 377. But the parties may provide for compensation in case of misdescription, and the injured party may sue on such a provision after the property has passed: *Palmer* v. *Johnson* (1884), 13 Q. B. D. 351.

expressions, such as "mere flourishing description by an auctioneer," will give the injured party no remedy.[1]

(iii.) Contracts for the allotment of shares. The promoters and directors of a company, when offering its shares to the public, "are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge, the existence of which might in any degree affect the nature, extent, or quality of the privileges and advantages, which the prospectus holds out as inducements to take shares." [2]

A prospectus, which does not give certain specified information, is now by virtue of section 81 of the Companies (Consolidation) Act, 1908,[3] deemed to be fraudulent, and anyone who has been misled by such a prospectus into taking shares, can not only bring an action to have the contract rescinded, but he can also sue the directors personally for damages.[4] By section 84 of the same Act, a director is also liable personally to anyone who has taken shares upon the strength of statements in the prospectus which were in fact untrue, unless the directors or other persons responsible for the prospectus show that they had reasonable grounds for believing the statements to be true.[5]

So, also, in contracts between company promoters and the company, the promoters must "fully and fairly disclose to the company all material facts, which the company ought to know." [6]

(iv.) Contracts of suretyship and partnership, though not strictly contracts *uberrimæ fidei*,[7] are, when once they have been actually entered into, such as to require full disclosure.[8] Where there is any kind of fiduciary relationship between the parties, *e.g.*, if they are solicitor and client or guardian and

[1] *Dimmock* v. *Hallett* (1866), L. R. 2 Ch. 21, 27. But see *Smith* v. *Land, &c., Corporation* (1884), 28 Ch. D. 7; *Carlish* v. *Salt*, [1906] 1 Ch. 335.

[2] *Per* Kindersley, V.-C., in *New Brunswick, &c., Ry. Co.* v. *Muggeridge* (1860), 1 Drew. & Smale, at pp. 381, 382. See *Central Venezuela Ry. Co.* v. *Kisch* (1867), L. R. 2 H. L. at p. 113; *Peek* v. *Gurney* (1873), L. R. 6 H. L. at p. 403.

[3] 8 Edw. VII. c. 69.

[4] See *Smith* v. *Chadwick* (1883), 9 App. Cas. 187; *Derry* v. *Peek* (1889), 14 App. Cas. 337.

[5] The section re-enacts the provisions of section 3 of the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), passed in consequence of the decision in *Derry* v. *Peek, suprd.* See *McConnel* v. *Wright*, [1903] 1 Ch. 546.

[6] *Per* Lindley, M. R., in *Lagunas Nitrate Co.* v *Lagunas Syndicate*, [1899] 2 Ch. at p. 422.

[7] See the judgment of Fry, J., in *Davies* v. *London and Provincial Insurance Co.* (1878), 8 Ch. D. at p. 475.

[8] See, for example, *Phillips* v. *Foxall* (1872), L. R. 7 Q. B. 666]

ward, full disclosure is necessary in their contracts.[1] So also in family arrangements for the settlement of family property.

The consent of the contracting parties may be unreal by reason of mistake. It is, however, no defence to an action on a contract that it was entered into under a mistake as to a general principle of law.[2] But a mistake as to a private right at law may avoid an agreement—for example, if a man mistakenly agreed to buy what was already his own property.[3] And a mistake of mixed law and fact would have the same effect.

Again, a mistake as to a material fact will avoid a contract in three cases:—

(i.) Mistake as to the subject-matter of the contract. The parties may mean different things, or they may be mistaken as to the existence of the subject-matter of the contract.

Thus, where the plaintiff and the defendant contracted about a cargo "to arrive *ex* Peerless from Bombay," and there were two ships of that name, both arriving from Bombay, and the plaintiff understood the contract to refer to one and the defendant to the other, it was held that there was no contract, for the two minds were not *ad idem*.[4] Here, if the contract had contained any such description as would identify one of the two ships, it would not have been avoided.

In *Couturier* v. *Hastie*[5] the parties agreed for the sale of a cargo of corn which, as they thought, was on the way to England. As a matter of fact, before the date of the contract it had been unloaded and sold at Tunis, because it was heated. It was held that the contract was void. Similarly the contract would be void if the subject-matter existed, but was completely different from what the parties supposed it to be. Unless it be completely different, the contract will stand. Thus a contract about a ship is not void through mistake if the ship be a wrecked ship.[6]

Apart from fraud, "there is no legal obligation on the vendor to inform the purchaser that he is under a mistake not induced by the vendor."[7] A man, who knows of the mistake (or who reasonably ought to have known

[1] See *Dougan* v. *Macpherson*, [1902] A. C. 197.

[2] *Powell* v. *Smith* (1872), L. R. 14 Eq. 85; and see *Stewart* v. *Kennedy* (1890), 15 App. Cas. 108.

[3] *Cooper* v. *Phibbs* (1867), L. R. 2 H. L. 149.

[4] *Raffles* v. *Wichelhaus* (1864), 2 H. & C. 906. Cf. *Hodges* v. *Horsfall* (1829), 1 Russ. & M. 116; *Smidt* v. *Tiden* (1874), L. R. 9 Q. B. 446.

[5] (1856), 5 H. L. Cas. 673; see *Strickland* v. *Turner* (1852), 7 Exch. 208 (an annuity for the life of a man already dead); and *Scott* v. *Coulson*, [1903] 2 Ch. 249.

[6] *Barr* v. *Gibson* (1838), 3 M. & W. 390. See *Kennedy* v. *Panama, &c., Mail Co.* (1867), L. R. 2 Q. B. 580.

[7] *Per* Blackburn, J., in *Smith* v. *Hughes* (1871), L. R. 6 Q. B. at p. 607.

of it [1]) at the time of the contract, cannot insist upon the contract.[2] A man is not entitled to "snap at an offer which he must perfectly well know to have been made by mistake." [3]

(ii.) Mistakes as to the act of expressing the contract. A man is entitled to show, for example, that he wholly misunderstood the nature of the document which he signed, so that his mind did not go with his act.

Where an old and short-sighted man endorsed a bill of exchange on the assurance that it was a guarantee, and was afterwards sued on the bill by a stranger to whom it had been endorsed, it was held that the stranger, though innocent of fraud, could not recover on the bill.[4] If an illiterate man signs a deed which is described to him as something which in fact it is not, the deed is void.[5] If a man, without negligence, signs a promissory note under the mistaken impression that he is merely witnessing a document, he is not liable.[6]

Mistakes of this kind frequently arise through the fraud of a third party, and sometimes also through his carelessness, as where a telegraph clerk forwards a message with a mistake in it.[7] In such a case there is no contract.

(iii.) Mistake as to the identity of the parties. Such a mistake, if the identity of the party is a material consideration in inducing the agreement, avoids the contract.

Thus, if A. B. succeeds X. as a shopkeeper, and C. D. deals with A. B. mistaking him for X. with whom alone he means to contract, the contract is void.[8] So where one Blenkarn, by imitating the signature of Blenkiron, induced someone to send him goods which were afterwards sold to a stranger, it was held that there was no contract and that delivery of the goods had passed no property in them.[9]

The remedies of a man who has entered into a contract under such a mistake are:—

(i.) He can refuse to execute the contract and plead mistake if sued upon it.

(ii.) On the same ground he can resist a claim for specific performance of the contract and counterclaim for its rescission.[10]

[1] *Paget* v. *Marshall* (1884), 28 Ch. D. 255.
[2] *Webster* v. *Cecil* (1861), 30 Beav. 62.
[3] *Per* James, L. J., in *Tamplin* v. *James* (1879), 15 Ch. D. at p. 221.
[4] *Foster* v. *Mackinnon* (1869), L. R. 4 C. P. 711.
[5] *Thoroughgood's Case* (1583), 2 Rep. 9; and *ante*, p. 672.
[6] *Lewis* v. *Clay* (1898), 67 L. J. Q. B. 224. See *Howatson* v. *Webb*, [1908] 1 Ch. 1.
[7] *Henkel* v. *Pape* (1870), L. R. 6 Ex. 7; see also *Thornton* v. *Kempster* (1814), 5 Taunt. 786, where an agent of both parties made a similar mistake.
[8] *Boulton* v. *Jones* (1857), 2 H. & N. 564.
[9] *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459. See *Gordon* v. *Street*, [1899] 2 Q. B. 641.
[10] *Paget* v. *Marshall*, *supra*.

(iii.) If he has paid money under it, he may recover the money back.[1] Money voluntarily paid under such mistake is deemed paid to the use of the person who pays it and is therefore recoverable, though money paid by compulsion of law or by way of compromise is not.[2]

Even where the parties are fully agreed, they sometimes express the terms of the agreement incorrectly. There are certain rules for the construction of documents which are available in such cases. If the exact intention of the parties can be clearly established, the parties have the equitable remedy of rectification. If they act upon a mistaken view of their agreement, the construction which they place upon it does not affect its legal meaning; but the behaviour of the parties may be evidence of what they really meant by their contract, or may even amount to a new contract to vary the original.[3]

Thus, if the parties enter into a written contract for the purchase and sale of a house which by a common error they misdescribe as No. 21, High Street, whereas it is really No. 23, either of them may apply to have the mistake in the written contract rectified, for their minds were *ad idem;* though, if one party thought he was selling No. 21 and the other thought he was buying No. 23, there would of course be no contract and neither could ask for rectification.

Again, mutual mistake as to the subject-matter of a contract is often concerned with the impossibility of performance. Where A. agreed with B. to load a complete cargo of guano at a certain island and bring it to England at a certain rate of freight, and it was found that the island contained so little guano as to make the performance of the contract impossible, the impossibility was held to be no defence for A. when sued by B. on his undertaking.[4] This case is hardly distinguishable from one in which the decision was otherwise. A tenant undertook to dig from certain ground not less than 1,000 tons of clay per year, paying a royalty of half-a-crown per ton to the landlord. There was not so much as 1,000 tons of clay in the ground: this was held to be a good defence against the landlord; "the covenant is applicable only if there be clay."[5]

Obvious physical or legal impossibility makes a contract no contract, because there is no consideration. We shall deal further with impossibility in Chapter VII. on "The Performance and Discharge of Contracts."

[1] See *Kelly* v. *Solari* (1841), 9 M. & W. 54, 58.
[2] *Moore* v. *Fulham Vestry*, [1895] 1 Q. B. 399; *Rogers* v. *Ingham* (1876), 3 Ch. D. 351; and see *Taylor* v. *Metropolitan Ry. Co.*, [1906] 2 K. B. 55.
[3] See *Midland G. W. Ry. Co.* v. *Johnson* (1858), 6 H. L. Cas. 798; *Marshall* v. *Berridge* (1881), 19 Ch. D. 233.
[4] *Hills* v. *Sughrue* (1846), 15 M. & W. 253.
[5] *Clifford* v. *Watts* (1870), L. R. 5 C. P. 577, 588.

## Chapter VI.

### ILLEGAL CONTRACTS.

Great as is the freedom allowed to contracting parties, the law refuses to enforce certain contracts which are immoral or in violation of positive law, or opposed to public policy. For this purpose it is immaterial whether the contract be special or simple.

"Notwithstanding the solemnity and force which the law ascribes to deeds, and all the strictness with which, in general, it prohibits the introduction of extrinsic evidence to prove that an instrument goes beyond, or does not fully contain, or incorrectly exhibits, the terms of the contract which it was written and signed for the purpose of expressing or recording, the rule is settled that a deed, *ex facie* just and righteous, may be vitiated and avoided by alleging and adducing extrinsic evidence to prove that it was founded on a consideration, or had a view or purpose, contravening law or public policy."[1]

"It is true that you cannot add to a contract under seal anything to vary the contract, but you may show *dehors* the instrument that such contract was entered into for an illegal purpose; such proof does not vary the terms of the contract, but merely shows the illegal object."[2]

Either the consideration or the promise may be illegal. A consideration which is bad in part is bad altogether,[3] whereas a promise which concerns several distinct and independent acts, of which some are legal and some are illegal, will be valid in regard to the former, void as to the latter.[4]

A written agreement may be single and entire, founded on one entire consideration; it may be severable in its nature, and deal with matters which are unconnected with and independent of each other. "In cases where the consideration is tainted by no illegality, but some of the conditions (if the contract in question be a bond) or promises (if it be a contract of any other description) are illegal, the illegality of those which are bad does not communicate itself to or contaminate those which are good,

[1] *Per* Knight Bruce, L. J., in *Reynell* v. *Sprye* (1852), 1 De G. M. & G. at p. 672.
[2] *Per* Lord Abinger, C. B., in *Gas Light and Coke Co.* v. *Turner* (1840), 6 Bing. N. C. at p. 327.
[3] *Waite* v. *Jones* (1835), 1 Bing. N. C. 656, 662.
[4] See *Bank of Australasia* v. *Breillat* (1847), 6 Moo. P. C. C. 152, 201.

except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another."[1] Where the act which is the subject of the contract may according to circumstances be lawful or unlawful, it will not be presumed that the contract was to do the unlawful act; the contrary is the proper inference.[2]

We must also inquire whether the connection between the illegal transaction and the contract is sufficiently close to invalidate the latter, *e.g.*, whether the doing of an illegal act was contemplated by the contracting parties.[3] Thus, if two parties agree to suppress a prosecution for felony, one of them cannot maintain an action against the other for an injury arising out of the transaction in which they have both been illegally engaged.[4] And where the plaintiff had at the request of the defendant published a libel and consented to defend an action brought against him for such publication, and the defendant therefore promised to indemnify the plaintiff from the costs of the action, this promise was held void.[5]

Even where the contract is connected with the illegal transaction in part only it will nevertheless be tainted thereby.[6] But a taint in the original transaction will not necessarily vitiate every contract growing out of it: otherwise persons innocently contracting might suffer loss through an illegality to which they were no party and of which they had no notice. The test seems to be, Does the plaintiff require aid from the illegal transaction in order to establish his claim?[7] If so, his action will fail. But where the consideration and the matter to be performed are both legal, a plaintiff will not be precluded from recovering by an infringement of the law occurring in the performance of his promise which is collateral to and was not contemplated by the contract.[8]

Certain contracts are expressly forbidden by statute. Thus the Ground Game Act, 1880,[9] which gives to every occupier of land the inseparable right to kill and take ground game thereon, provides that "every agreement, condition

[1] Note to *Collins* v. *Blantern* (1766), 1 Smith, L. C., 11th ed., at pp. 386, 387. And see the remarks of Willes, J., in *Pickering* v. *Ilfracombe Ry. Co.* (1868), L. R. 3 C. P. at p. 250; and *In re Burdett, Ex parte Byrne* (1888), 20 Q. B. D. 310.

[2] *Per* Lord Abinger, C. B., in *Lewis* v. *Davison* (1839), 4 M. & W. at p. 657.

[3] See *Edgeware Highway Board* v. *Harrow Gas Co.* (1874), L. R. 10 Q. B. 92; *Waugh* v. *Morris* (1873) L. R. 8 Q. B. 202, 207.

[4] *Fivaz* v. *Nicholls* (1846), 2 C. B. 501.

[5] *Shackell* v. *Rosier* (1836), 2 Bing. N. C. 634; and see *W. H. Smith & Son* v. *Clinton and Harris* (1908), 99 L. T. 840.

[6] *Collins* v. *Blantern* (1766), 1 Smith, L. C., 11th ed., 369.

[7] *Taylor* v. *Bowers* (1876), 1 Q. B. D. 291; and see cases there cited.

[8] See the judgment of Lord Tenterden, C. J., in *Wetherell* v. *Jones* (1832), 3 B. & Ad. at pp. 225, 226; *Rosewarne* v. *Billing* (1863), 15 C. B. N. S. 316.

[9] 43 & 44 Vict. c. 47, s. 3.

or arrangement, which purports to divest or alienate the right of the occupier" as declared by the Act, shall be void. Again, persons cannot contract themselves out of statutory benefits conferred on them by the Workmen's Compensation Act, 1906,[1] the Old Age Pensions Act, 1908,[2] and the Agricultural Holdings Act, 1908.[3] Sometimes contracts are prohibited under statutes which regulate trades and professions. Thus the sale of spirituous liquors,[4] bread,[5] game birds,[6] and coal[7] is prohibited if it takes place under certain specified conditions. Further, doctors and solicitors cannot recover their fees unless they have qualified themselves in a specified way.[8] Under the Money-lenders Act, 1900,[9] the business agreements of an unregistered money-lender are illegal and void; the borrower may recover securities given to the money-lender under such agreements. The Truck Act, 1831,[10] forbids contracts for payment of wages otherwise than in money. The Children Act, 1908,[11] forbids the insurance of nurse-children by their foster-parents.

An Act of Charles II. makes Sunday trading illegal.[12] Contracts will not be enforced if completed on a Sunday and made within the course of a man's ordinary calling, "works of necessity and charity only excepted." The Courts, however, show little inclination to interpret strictly a statute upon which public feeling no longer lays much stress.

To promise to present a man to a vacant "benefice with cure of souls" for money or other valuable consideration is simony; such a contract is forbidden by statute.[13] To "take,

[1] 6 Edw. VII. c. 58, s. 3.
[2] 8 Edw. VII. c. 40, s. 6.
[3] 8 Edw. VII. c. 28, s. 5.
[4] 24 Geo. II. c. 40, s. 12.
[5] 6 & 7 Will. IV. c. 37, s. 4.
[6] 1 & 2 Will. IV. c. 32, ss. 4, 25.
[7] 52 & 53 Vict. c. 21, s. 20.
[8] 37 & 38 Vict. c. 68, s. 12; 21 & 22 Vict. c. 90, s. 32.
[9] 63 & 64 Vict. c. 51, see *ante*, p. 711; and *Victorian Daylesford Syndicate, Ltd.* v. *Dott*, [1905] 2 Ch. 624; *Bonnard* v. *Dott*, [1906] 1 Ch. 740; *Sadler* v. *Whiteman*, [1910] 1 K. B. 868. But see the equitable case of *Lodge* v. *National Union Investment Co.*, [1906] 1 Ch. 300.
[10] 1 & 2 Will. IV. c. 37.
[11] 8 Edw. VII. c. 67, s. 7. See *post*, Chap. XV., Contracts of Assurance.
[12] 29 Car. II. c. 7. See *Phillips* v. *Innes* (1837), 4 Cl. & F. 234 (Sunday shaving not excepted from the statute); *Palmer* v. *Snow*, [1900] 1 Q. B. 725 (hairdresser not within the statute); *Bullen* v. *Ward* (1906), 93 L. T. 439 (fried fish shop outside the statute).
[13] 31 Eliz. c. 6, s. 5. And see *Mosse* v. *Killick* (1881), 50 L. J. Q. B. 300.

procure, or accept the next avoidance of or presentation to any benefice with cure of souls" is a simoniacal contract and utterly void.[1] A bond by a person presented to a living, promising to resign at a future date, was at common law illegal; but such bonds are now legalised under certain conditions.[2]

If a statute renders a contract illegal, it makes no difference in law whether the statute has in view the protection of the revenue or any other object.[3] The sole question will be, Does the statute mean to prohibit the contract? Such an intention may be manifested as well by the infliction of a penalty, as by express prohibitory words, for a penalty implies a prohibition.[4]

If statutes do not purport to prohibit acts, but only impose penalties for revenue purposes, a contract to perform such acts will not be illegal.[5] But "if two parties enter into an agreement, whereby it is stipulated that one of them shall be enabled to commit an act that is contrary to public policy, and contrary to the provisions of an Act of Parliament, though not expressly prohibited thereby, except by the imposition of a penalty, the agreement is illegal and void."[6]

"I think," said Lord Esher, M.R.,[7] "that this rule of interpretation has been laid down, that, although a statute contains no express words making void a contract which it prohibits, yet when it inflicts a penalty for the breach of the prohibition, you must consider the whole Act as well as the particular enactment in question, and come to a decision, either from the context or the subject-matter, whether the penalty is imposed with intent merely to deter persons from entering into the contract, or for the purposes of revenue, or whether it is intended that the contract shall not be entered into so as to be valid at law."

Other contracts which have been held illegal as contrary to public policy are marriage brokerage contracts (*i.e.*, contracts to procure a marriage for reward), and contracts not to marry.[8] A bond or a lease in consideration of the

[1] 12 Anne, st. 2, c. 12, s. 2; and see *Walsh* v. *Bishop of Lincoln* (1875), L. R. 10 C. P. 518; Benefices Act, 1898 (61 & 62 Vict. c. 48).

[2] 9 Geo. IV. c. 94.

[3] See *Ramsden* v. *Lupton* (1873), L. R. 9 Q. B. 17, 25.

[4] *Cope* v. *Rowlands* (1836), 2 M. & W. 149, 157; *Johnson* v. *Hudson* (1809), 11 East, 180.

[5] *Smith* v. *Mawhood* (1845), 14 M. & W. 452; *Learoyd* v. *Bracken*, [1894] 1 Q. B. 114.

[6] *Per* Maule, J., in *Ritchie* v. *Smith* (1848), 6 C. B. at p. 477.

[7] *Melliss* v. *Shirley Local Board* (1885), 16 Q. B. D. at p. 451.

[8] A condition in a will in restraint of second marriage is not void: *Allen* v. *Jackson* (1875), 1 Ch. D. 399; nor is one in restraint of marriage with a particular person or with a member of a class: *Jenner* v. *Turner* (1880), 16 Ch. D. 188.

procurement of marriage will be set aside.[1] It has been recently decided[2] that an agreement to introduce persons of opposite sex to one another with a view to marriage is illegal, and that it is immaterial if in such a case the possible husband or wife is an uncertain person. Even if the broker has procured introductions and incurred consequent expense, money paid to him under such an agreement is recoverable.[2] A promise of marriage made by a man, who to the woman's knowledge has a wife alive, is void as being against public policy; it cannot, therefore, be enforced by action after the death of the wife.[3] Illegal also are deeds and agreements made in contemplation of a future separation between husband and wife.[4] So are contracts made with a view to compromising prosecutions for felonies or grave misdemeanours,[5] or in any way to pervert the course of justice.[6]

And generally "no subject can lawfully do that which has a tendency to be injurious to the public or against the public good."[7]

Thus, "when a bribe is given, or a promise of a bribe is made, to a person in the employ of another by some one who has contracted or is about to contract with the employer, with a view to inducing the person employed to act otherwise than with loyalty and fidelity to his employer, the agreement is a corrupt one and is not enforceable at law, whatever the actual effect produced on the mind of the person bribed may be."[8] If the contract is disadvantageous to the principal he has two remedies:—

(i.) he may recover from the agent the amount of the bribe as money had and received to his use;

(ii.) he may recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss sustained, without allowing for any deduction in respect of money recovered under the first head.

[1] See *Stribblehill* v. *Brett* (1703), 2 Vern. 445; *Keat* v. *Allen* (1707), 2 Vern. 588.

[2] *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123.

[3] *Wilson* v. *Carnley*, [1908] 1 K. B. 729.

[4] But not deeds contemplating an immediate separation: *Hindley* v. *Earl of Westmeath* (1828), 6 B. & C. 200; *Besant* v. *Wood* (1879), 12 Ch. D. 605; *Harrison* v. *Harrison*, [1910] 1 K. B. 35.

[5] See *ante*, pp. 202, 203, 673.

[6] See *Flower* v. *Sadler* (1882), 10 Q. B. D. 572; *Jones* v. *Merionethshire Building Society*, [1892] 1 Ch. 173; *Windhill Local Board of Health* v. *Vint* (1890), 45 Ch. D. 351; *R.* v. *Porter*, [1910] 1 K. B. 369.

[7] *Per* Lord Truro in *Egerton* v. *Earl Brownlow* (1853), 4 H. L. Cas. at p. 196. The changes in the doctrine of "public policy" are discussed in *Davies* v. *Davies* (1887), 36 Ch. D. 359.

[8] *Per* Cockburn, C. J., in *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q. B. D. 551. Cf. *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369.

The bribery of agents is now a misdemeanour under the Prevention of Corruption Act, 1906.[1] Contracts for the sale of public offices or the resignation of public officers, and contracts for purchasing titles of honour are illegal at common law and in some cases also by statute.

Agreements which lead to abuse of legal process by encouraging speculative litigation are illegal. Such agreements come under the law of "maintenance" in cases "where a man improperly and for the purpose of stirring up litigation and strife encourages others to bring actions or to make defences which they have no right to make" or under the law of "champerty" where the object of the maintainer is to have a part of the land, money, &c., which the litigation attempts to obtain.[2]

Thus, to give an indemnity for his costs to an informer who seeks to enforce a statutory penalty is illegal;[3] but to assist a poor man from motives of charity,[4] or to assist a relative, to maintain a suit, would not be maintenance. Nor, apparently, is it unlawful to give information which will lead to the recovery of property in consideration of receiving part of the property so to be recovered.[5] Nor is it champerty if a solicitor promises not to charge his client anything for costs.[6]

Since the object of the bankruptcy laws is to provide for a rateable distribution of the bankrupt's property amongst all his creditors, a promise to give any preference to a particular creditor by a trader in contemplation of bankruptcy, or to induce him to sign a composition deed, is illegal and void.[7]

Lotteries are illegal; a "missing word" competition has been held to come within the statute against lotteries, and competitors were entitled to receive back their contributions, if notice of their claim was given before the money was paid away.[8]

[1] 6 Edw. VII. c. 34. Compare the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69), *ante*, pp. 186, 187. In *Lister* v. *Stubbs* (1890), 45 Ch. D. 1, it was decided that the bribed agent is the principal's debtor, not his trustee.

[2] *Per* Lord Abinger, C. B., in *Findon* v. *Parker* (1843), 11 M. & W. at p. 682. See *Alabaster* v. *Harness*, [1895] 1 Q. B. 339; *British, &c., Conveyors, Ltd.* v. *Lamson, &c., Ltd.*, [1908] 1 K. B. 1006, 1014; and *ante*, pp. 199–201.

[3] *Bradlaugh* v. *Newdegate* (1882), 11 Q. B. D. 5.

[4] *Harris* v. *Brisco* (1886), 17 Q. B. D. 504.

[5] *Rees* v. *De Bernardy*, [1896] 2 Ch. at pp. 446, 447.

[6] *Per* Bovill, C. J., in *Jennings* v. *Johnson* (1873), L. R. 8 C. P. at p. 426.

[7] See *ante*, pp. 369, 370, 674.

[8] See 42 Geo. III. c. 119, s. 1; *Barclay* v. *Pearson*, [1893] 2 Ch. 154; *Hawke* v. *Hulton & Co.*, [1909] 2 K. B. 93; and *ante*, p. 238.

A wager is only void, and not in itself illegal. "Wagers, which were not against morality, decency or sound policy, were in olden days allowed as the foundation of actions at common law, probably without sufficient anticipation of the results which might follow."[1] "By common law wagers were not illegal, and the nature of a wager is such that from the point of view of jurisprudence there is ample consideration for a valid contract. The distinction which English law makes between wagering contracts and others is therefore entirely the creation of statute."[2]

Wagers which were "foolish," or which tended to annoy others or to waste the time of the Court,[3] or to outrage decency,[4] were discountenanced at common law. The statute law interfered at first in respect of sums lost in playing at games or betting on the players. The Gaming Act, 1710,[5] declared that securities of all kinds, if wholly or partly given in consideration of gaming losses or to repay money knowingly advanced for such purposes, should be void. As an innocent person might thereby suffer by taking such securities without notice of their inherent illegality, the Act of 1835[6] provided that such securities should thenceforth be taken to have been given on an illegal consideration. But the *bonâ fide* holder for value of such securities could recover upon them, if after notice of the illegality he could successfully establish his own good faith and ignorance of the illegal origin.[7]

The Gaming Act, 1842,[8] declared "all contracts or agreements, whether by parol or in writing, by way of gaming or wagering" to be null and void. Thus the Courts are spared the difficulty of deciding between legal and illegal contracts.

[1] *Per* Gorell Barnes, President, in *Hyams* v. *Stuart King*, [1908] 2 K. B. at p. 709; and see the remarks of Lord Campbell, in *Ramloll Thackoorseydass* v. *Soojumnull Dhondmull* (1848), 6 Moo. P. C. C. at p. 310.

[2] *Per* Fletcher Moulton, L. J., in *Hyams* v. *Stuart King*, [1908] 2 K. B. at p. 712. For the history of the law of gaming contracts, see his judgment in *Moulis* v. *Owen*, [1907] 1 K. B. at p. 758.

[3] *Eltham* v. *Kingsman* (1818), 1 B. & Ald. 683, 688. See the remarks of Bayley, J., in *Gilbert* v. *Sykes* (1812), 16 East, at p. 162.

[4] *Da Costa* v. *Jones* (1778), 2 Cowp. 729.

[5] 9 Anne, c. 19, s. 1 (extending 16 Car. II. c. 7).

[6] 5 & 6 Will. IV. c. 41, s. 1.

[7] For cases of security given abroad, see *Robinson* v. *Bland* (1760), 2 Burr. 1077; *Moulis* v. *Owen*, [1907] 1 K. B. 746.

[8] 8 & 9 Vict. c. 109, s. 18.

Though all wagers are void, they are not made punishable in a criminal Court, but merely unenforceable in a civil Court.[1]

In spite of this statute, if one man lost a bet and got another man to pay the money on his behalf, an action to recover the money was held to lie.[2] And where a man employed an agent to bet for him, and the bet was made and lost, the agent was held able to recover from his principal the money paid away under the bet.[3] In this respect the law was changed by the Gaming Act, 1892,[4] which provided that "any promise to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money."

Some subsequent decisions may well be considered here. In 1893, in *Tatam* v. *Reeve*,[5] the plaintiff paid for, and at the request of, the defendant certain sums to certain persons to whom the defendant had lost bets. These payments were held to be money paid "in respect of" a gaming contract within the Gaming Act, 1892, consequently the plaintiff could not recover these sums from the defendant. Similarly, where plaintiff and defendant betted in partnership on horse races, the plaintiff, who paid the losses and claimed contribution from the defendant, was held unable to recover.[6] But a betting agent who has received money on behalf of his principal is not entitled to retain it.[7]

Where A. B. handed to C. D. as stakeholder a sum of money to be paid to X. if X. should win a race against A. B., A. B., after racing and losing, sought to claim the money back from C. D. It was held that section 1 of

[1] As to whether the Gaming Act must be pleaded, see *Scott* v. *Brown*, [1892] 2 Q. B. 724. But as to County Court practice see *Willis* v. *Lovick*, [1901] 2 K. B. 195.

[2] *Rosewarne* v. *Billing* (1863), 15 C. B. N. S. 316; *Ex parte Pyke, In re Lister* (1878), 8 Ch. D. 754.

[3] *Read* v. *Anderson* (1884), 13 Q. B. D. 779. But in *Cohen* v. *Kittell* (1889), 22 Q. B. D. 680, the Court dismissed an action against an agent for not making bets as directed.

[4] 55 Vict. c. 9.

[5] [1893] 1 Q. B. 44.

[6] *Saffery* v. *Mayer*, [1901] 1 K. B. 11. But the Betting Act, 1853 (16 & 17 Vict. c. 119), does not make a partnership of bookmakers illegal: *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496; and income tax must be paid on the profits of a betting business: *Partridge* v. *Mallandaine* (1886), 18 Q. B. D. 276.

[7] *De Mattos* v. *Benjamin* (1894), 63 L. J. Q. B. 248.

the Act of 1892 ("money paid by him") does not apply to money deposited to abide the result of a bet.[1] Money lent for the purpose of gambling abroad in a country where such gambling is not illegal may be recovered in this country.[2]

The defect of consideration in a gaming contract may sometimes be cured by the importation of a new and not illegal consideration.

Thus, where an action to recover a gaming debt had been dismissed, the creditor wrote to the debtor's club complaining of his conduct in not paying debts of honour; the debtor, in consideration of the letter being withdrawn, gave the creditor bills in satisfaction of his debt. It was held that "the bills were given for an altogether new consideration, which was not an illegal consideration. They were given, not to pay the gaming debt, but, as Romilly, M. R., said in *Bubb* v. *Yelverton*,[3] to avoid the consequences of not having paid it."[4]

Similarly, where a bookmaker sued the defendant for sums which the latter pleaded were gambling debts, it was held that forbearance to sue at the defendant's request might constitute a new and valid consideration for the debt.[5] So also, where the plaintiff and the defendant were bookmakers, the forbearance of the plaintiff to sue, coupled with his forbearance to declare the defendant a defaulter, was held a good consideration for a fresh agreement entitling plaintiff to recover the balance of betting debts.[6]

Bets on the price of stocks or shares could have been enforced at common law. Sir John Barnard's Act in 1734[7] endeavoured to check the "infamous practice of stock-jobbing" by rendering null and void all contracts for the sale of public securities where the seller was not actually possessed of, or entitled to, the securities. The Act proved in the main ineffective and was repealed in 1860.[8] Speculative dealings in stocks and shares generally fall outside the Gaming Acts

[1] *O'Sullivan* v. *Thomas*, [1895] 1 Q. B. 698; followed in *Burge* v. *Ashley & Smith, Ltd.*, [1900] 1 Q. B. 744.

[2] *Quarrier* v. *Colston* (1842), 1 Phill. 147; *Saxby* v. *Fulton*, [1909] 2 K. B. 208. But see *Moulis* v. *Owen*, [1907] 1 K. B. 746.

[3] (1870), L. R. 9 Eq. at p. 474.

[4] *Per* Buckley, J., in *In re Browne, Ex parte Martingell*, [1904] 2 K. B. at p. 135. And see *Goodson* v. *Baker* (1908), 98 L. T. 415.

[5] *Goodson* v. *Grierson*, [1908] 1 K. B. 761; and therefore the Court refused to dismiss the action as frivolous and vexatious (see *Kershaw* v. *Sievier* (1904), 21 Times L. R. 40).

[6] *Hyams* v. *Stuart King*, [1908] 2 K. B. 696 (but see the dissenting judgment of Fletcher Moulton, L. J.); followed in *Hodgkins* v. *Simpson* (1908), 25 Times L. R. 53.

[7] 7 Geo. II. c. 8.

[8] 23 & 24 Vict. c. 28.

of 1845 and 1892; they are not gaming and wagering contracts, unless there is no intention on the part of either party to deliver or take delivery of stocks and shares and also no obligation on either side so to do. "It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value and with the intention of realising a profit by its resale. Such dealings are of every-day occurrence in commerce. The legal aspect of the case is the same whatever be the nature of the commodity, whether it be a cargo of wheat or the shares of a joint-stock company. Nor, again, do such purchases and sales become gaming contracts because the person purchasing is not possessed of the money required to pay for his purchases, but obtains the requisite funds in a large measure by means of advances on the security of the stocks or goods he has purchased."[1]

Dealings in shares with members of the Stock Exchange are subject to such rules and such a course of practice as generally to exclude the operation of the Gaming Acts. Even "option dealings" are not in their nature gaming and wagering contracts.[2] In a case where outside brokers were concerned, the jury were asked: "Notwithstanding these ostensible terms of business, was there a secret understanding that the stock should never be called for or delivered, and that differences only should be dealt with?" They answered, "Yes," and the Court (upheld by the Court of Appeal and House of Lords) declared the contracts consequently void.[3] If the agreement is in fact an agreement to "pay differences," it will not be less a gaming and wagering contract because terms are inserted in it only to cloak the fact that it is a gambling transaction. Money due on such agreements cannot be recovered, but securities deposited to provide for losses may be recovered through the failure of the consideration for which they were deposited.[4]

Agreements to induce persons to believe in a false market value for shares are illegal.[5]

Contracts between partners, masters and apprentices, employers and employees, frequently contain covenants, by which one party promises not to set up in business in

[1] *Per* Lord Herschell in *Forget* v. *Ostigny*, [1895] A. C. at p. 323; and see *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685.

[2] *Buitenlandsche Bankvereeniging* v. *Hildesheim* (1903), 19 Times L. R. 641.

[3] *Universal Stock Exchange* v. *Strachan*, [1896] A. C. 166. As to what is evidence of such a secret understanding, see *In re Gieve*, [1899] 1 Q. B. 794.

[4] *In re Cronmire, Ex parte Waud*, [1898] 2 Q. B. 383.

[5] *Scott* v. *Brown*, [1892] 2 Q. B. 724.

opposition to the other within a defined area and for a defined period after the termination of the contract. These are called covenants in restraint of trade. Though not in themselves criminal, they cannot be enforced in a civil court.[1] With respect to such contracts the policy of the law has undergone considerable development under the changing conditions of commerce. If there is some consideration for the agreement, and if the agreement is reasonable—that is to say, if it fairly protects the party who seeks to enforce it without interfering with the public interest, the agreement will be enforced.

In *Mills* v. *Dunham*[2] Lindley, L. J., observed :—"To treat a restraint of trade as *primâ facie* bad, and throw upon the person supporting it the *onus* of showing that it is reasonable, is introducing a wholly unsound principle into the construction of documents. . . . You are to construe the contract, and then see whether it is legal."

The contract may specify the place where, or the persons with whom, or the time during which, trade is to be restrained. The legality of these restrictions is best illustrated by the case of *The Maxim-Nordenfelt Gun Co.* v. *Nordenfelt*.[3] There the defendant, an inventor who traded in the making of guns and ammunition, sold his business to the plaintiff company for a certain sum upon the terms that for twenty-five years he should be restrained from making guns, ammunition, &c., and from carrying on any business likely to compete with the business carried on by the plaintiff company, but that he should not be restrained from dealing in explosives other than gunpowder, in torpedoes, submarines and certain other materials. Before the period of restraint expired the defendant attached himself to another firm which traded in guns and ammunition. Thereupon the plaintiff company asked for an injunction against him. The Court of Appeal held that the restraint from competition with the company in any of its business was a general restraint of trade and therefore unenforceable. The Court, however, did not allow this decision to vitiate the whole contract, but held that the covenant was severable from the rest of the contract. It further decided that the agreement by which the defendant sold his business and covenanted to retire from it was not a general restraint of trade, but that it was reasonable between the parties (for Nordenfelt received a large sum of money and reserved himself certain spheres of work) and not injurious to the public. Many such partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported ; such is the case of selling a shop in a particular place with a covenant by the vendor not to carry on a trade in the same place.

[1] The *dictum* of Crompton, J., in *Hilton* v. *Eckersley* (1855), 6 E. & B. at pp. 53—57, is overruled by the judgments of Bowen and Fry, L. JJ., in *Mogul S.S. Co.* v. *McGregor, Gow & Co.* (1889), 23 Q. B. D. at pp. 619, 627.

[2] [1891] 1 Ch. at p. 586.

[3] [1893] 1 Ch. 630 [1894] A. C. 535.

This is in effect the sale of a goodwill, and offers an encouragement to trade by allowing men to dispose of the fruits of their industry. The vendor will not be entitled to canvass the customers of the old firm.[1] The purchaser of a business, to whom is assigned all the beneficial interest and goodwill of the vendor in the business, is entitled to use the vendor's name to show that the business purchased was formerly the vendor's, but not so as to expose the vendor to liability.[2] Again, a trader or professional man may take into his service a clerk or servant under a covenant that he will not carry on the same trade or profession within certain limits. Here the employer benefits by the security and freedom of choice of assistants which he obtains, while the public benefit in that the master does not withhold from the servant instruction in the secrets and experience of the trade from the fear of afterwards having a rival in the same business.[3]

A contract in restraint of trade must have some consideration to support it, whether it be under seal or not.[4] The Court, however, will not inquire into the adequacy of the consideration.[5] It is satisfied if the contract is reasonable as between the parties. Whether the terms of a covenant are reasonable is a question for the judge;[6] the opinion of other persons in the trade is inadmissible.[7]

With regard to the duration of the restriction, it is now settled that it may continue during the life of either party and that it need not be limited to the period during which the employer carries on his business. "The goodwill of a trade is a subject of value and price. It may be sold, bequeathed, or become an asset in the hands of the personal representative of a trader. And if the restriction as to time is to be held to be illegal if extended beyond the period of the party by himself carrying on the trade, the value of such goodwill considered in those various points of view is altogether destroyed."[8]

As to the extent of area over which the restriction is to be in force, our Courts will consider whether the restraint

[1] *Trego* v. *Hunt*, [1896] A. C. 7. As to what is goodwill, see *Ginesi* v. *Cooper* (1880), 14 Ch. D. 596.
[2] *Thynne* v. *Shove* (1890), 45 Ch. D. 577.
[3] See *Mumford* v. *Gething* (1857), 7 C. B. N. S. 305.
[4] See *Mitchel* v. *Reynolds* (1711), 1 Smith, L. C., 11th ed., 421.
[5] *Hitchcock* v. *Coker* (1837), 6 A. & E. 438, 457.
[6] *Dowden & Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45.
[7] *Haynes* v. *Doman*, [1899] 2 Ch. 13.
[8] *Per cur.* in *Hitchcock* v. *Coker* (1837), 6 A. & E. at p. 454; and see the remarks of Bowen, L. J., in *Maxim* v. *Nordenfelt*, [1893] 1 Ch. at p. 666.

(to which formerly some limit was considered necessary) is larger and wider than the protection of the party with whom the contract is made can possibly require; if so, it must be deemed unreasonable in law and the contract creating it is altogether void.[1] The Court will not enforce it even within limits which it would have deemed reasonable, for this would be making a fresh contract between the parties. The test of the validity of a covenant in restraint of trade, whether limited or unlimited in the area of its application, is whether it be reasonable.[2] Sometimes the area may be held to be too large;[3] sometimes an unlimited restriction will be valid, if reasonably necessary for the protection of the party contracting.[4] Or the covenant may restrain the other party from doing business with a particular class of persons: for example, a solicitor's articled clerk might validly be restrained from acting for the solicitor's existing clients.[5]

Much depends on the nature of the trade or profession, the populousness of the neighbourhood, the mode in which the trade or profession is usually carried on, and other matters with which the Court cannot always be conversant. The interest of the party claiming protection has been held to extend very widely. Thus contracts between professional men have been supported where the area of exclusion was greater than the area of the plaintiff's practice. In *Horner* v. *Graves*[6] the area of exclusion from practice as a dentist was a circle round York of the diameter of 200 miles; although holding the restriction too large, the Court observed that, unless the case was such that the restraint was plainly and obviously unnecessary, they would not feel themselves justified in interfering. In *Price* v. *Green*[7] a covenant not to carry on a certain trade "within the cities of London or Westminster, or within the distance of 600 miles from the same respectively," was held to be divisible—good, so far as it related to London and Westminster, but void as to the other part. And in *Tallis* v. *Tallis*,[8] a

[1] *Dowden & Pook, Ltd.* v. *Pook*, [1904] 1 K. B. 45; *Lamson Pneumatic Tube Co.* v. *Phillips* (1905), 91 L. T. 363. Where distance is specified, it must be measured in a straight line from point to point: *Mouflet* v. *Cole* (1872), L. R. 8 Ex. 32.

[2] *Nordenfelt* v. *Maxim-Nordenfelt Gun Co.*, [1894] A. C. 535; *Dubowski* v. *Goldstein*, [1896] 1 Q. B. 478.

[3] *Hooper and Ashby* v. *Willis* (1906), 94 L. T. 624.

[4] *Mills* v. *Dunham*, [1891] 1 Ch. 576; *Badische Anilin Fabrik* v. *Schott*, [1892] 3 Ch. 447; *Nordenfelt* v. *Maxim-Nordenfelt Co.*, *supra*.

[5] See *Nicholls* v. *Stretton* (1847), 10 Q. B. 346; *May* v. *O'Neill* (1875), 44 L. J. Ch. 660. Compare *Dubowski* v. *Goldstein*, *supra*.

[6] (1831), 7 Bing. 735, 744; and see *Mallan* v. *May* (1843), 11 M. & W. 653, 667; (1844), 13 M. & W. 511.

[7] (1847), 16 M. & W. 346. See *Rogers* v. *Maddocks*, [1892] 3 Ch. 346; *William Robinson & Co.* v. *Heuer*, [1898] 2 Ch. 451; *Hooper and Ashby* v. *Willis* (1905), 21 Times L. R. 691.

[8] (1853), 1 E. & B. 391; see *Welstead* v. *Hadley* (1904), 21 Times L. R. 165.

covenant by which the defendant restricted himself from carrying on the business of a canvassing publisher in London and within 150 miles of the General Post Office, or in Liverpool or Manchester, or within a like distance of either of those towns, was held to be a not unreasonable restriction upon a man carrying on such a business.

Recent cases have carried this even further. Thus in *Leather Cloth Co.* v. *Lorsont*,[1] the defendant was held bound by his covenant not to carry on directly or indirectly, or allow others to carry on, in any part of Europe the manufacture or sale of productions manufactured by the process sold by him to the plaintiffs. And in *Rousillon* v. *Rousillon*,[2] it was decided by Fry, J., that there is no absolute rule that a covenant in restraint of trade is void, even though unlimited in extent. The question in each case is whether the restraint extends further than is necessary for the reasonable protection of the covenantee. If it does not do that, the performance of the covenant will be enforced, even though the restriction be unlimited as to space. Thus, an agreement by a defendant not to represent any other champagne house for two years after leaving the plaintiffs, nor to establish himself nor associate himself with other persons or houses in the champagne trade for ten years after that date, was held good.[3]

A contract of immoral tendency cannot be made the foundation of an action by either party to it. For instance, an agreement with a view to future illicit cohabitation is void;[4] the hire of a carriage,[5] or the rent of lodgings,[6] to enable a woman of loose character to attract or to consort with men, cannot be recovered; a printseller cannot recover the price of libellous or indecent prints delivered to the defendant.[7] Generally "if a person makes a contract with the knowledge that another intends to apply its subject-matter to an immoral purpose, he cannot recover upon it."[8] "A contract lawful in itself" is "illegal if it be entered into with the object that the law should be violated."[9]

It is clear that past cohabitation or previous seduction would not be a good consideration for a parol promise; neither would it be an illegal

[1] (1869), L. R. 9 Eq. 345. But see the remarks of Cotton, L. J., in *Davies* v. *Davies* (1887), 36 Ch. D. at p. 385.

[2] (1880), 14 Ch. D. 351.

[3] *Rousillon* v. *Rousillon*, *suprà*.

[4] *Walker* v. *Perkins* (1764), 3 Burr. 1568; *Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. 275.

[5] *Pearce* v. *Brookes* (1866), L. R. 1 Ex. 213.

[6] *Appleton* v. *Campbell* (1826), 2 Car. & P. 347; and see *Feret* v. *Hill* (1854), 15 C. B. 207.

[7] *Fores* v. *Johnes* (1802), 4 Esp. 97; and see *Poplett* v. *Stockdale* (1825), R. & M. 337.

[8] *Per* Mellor, J., in *Taylor* v. *Chester* (1869), L. R. 4 Q. B. at p. 311.

[9] *Per cur.* in *Waugh* v. *Morris* (1873), L. R. 8 Q. B. at p. 207; *Burrows* v. *Rhodes and Jameson*, [1899] 1 Q. B. 816.

consideration : it would be no consideration at all. Inasmuch, however, as an instrument under seal does not require a consideration to support it, a bond given for the maintenance of a woman, founded on past cohabitation, would be good ;[1] but "it by no means follows that a covenant to pay a sum of money tainted with illegality can be enforced."[2] For example, a covenant to pay damages to a petitioner for divorce on the ground of adultery would be void as contrary to the policy of the law.[3] And if an agreement was made to pay a sum of money in consideration of future cohabitation and after cohabitation the money had remained unpaid, a bond given to secure that money could not under the circumstances be enforced.[4]

Generally, in the words of Lord Ellenborough, "wherever the tolerating of any species of contract has a tendency to produce a public mischief or inconvenience, such a contract has been held to be void."[5] Nevertheless "it must not be forgotten," said Jessel, M. R., "that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because, if there is one thing more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract."[6]

[1] *Vallance* v. *Blagden* (1884), 26 Ch. D. 353.
[2] *Per cur.* in *Fisher* v. *Bridges* (1854), 3 E. & B. at p. 650.
[3] *Per* Lord Wensleydale in *Gipps* v. *Gipps* (1864), 11 H. L. Cas. at p. 24.
[4] *Fisher* v. *Bridges, suprà.* And see the remarks of Lord Selborne in *Ayerst* v. *Jenkins* (1873), L. R. 16 Eq. at p. 282.
[5] *Gilbert* v. *Sykes* (1812), 16 East, at pp. 156, 157.
[6] *Printing, &c., Co.* v. *Sampson* (1875), L. R. 19 Eq. at p. 465.

## Chapter VII.

### BREACHES OF CONTRACT: PERFORMANCE AND DISCHARGE.

We have dealt with the formation of contracts and the nature and extent of the legal obligations which arise out of them. We proceed to discuss the extent of the civil liability which arises from a breach of contract. We shall also consider the cases in which such liability ceases and the obligation is dissolved. The breach or neglect by one party of his obligation under a contract at once confers a right of action on the other for at all events nominal damages. But it does not dissolve the contract or release either party from performing their respective duties under it.

In an ordinary action for breach of contract the plaintiff must, as a rule, prove four things:—

(i.) The contract.

(ii.) The performance by the plaintiff of his part of the contract—or, at all events, readiness to perform his part.

(iii.) A breach of the contract by the defendant.

(iv.) Special damage, if any has been alleged.

(i.) In the first place the plaintiff must prove the contract on which he sues. If the defendant has pleaded the Statute of Frauds, the plaintiff must prove either that the contract does not fall within that statute, or that its provisions have been complied with. If the defendant has pleaded a Statute of Limitation, the plaintiff must show that his cause of action accrued or has been revived within the prescribed period.[1] If the defendant has pleaded the non-performance of any condition precedent,[2] the plaintiff must establish that all times have elapsed and that all things have happened which were necessary preliminaries to the defendant's becoming liable on the contract. Where there is a special contract still

[1] See further as to the Statutes of Limitation, Book VI., Chap. XI.
[2] Order XIX., r. 14.

"open" between the parties (*i.e.*, not yet fully performed and still binding on the parties), no action can as a rule be brought except upon that contract. In some cases, however, as we shall see, the conduct of the defendant may give the plaintiff a right to rescind the contract or to regard it as rescinded by the defendant; and then the plaintiff may, if he thinks fit, sue upon a new contract, which is implied by law from the circumstances. In that case the plaintiff must set out in his Statement of Claim and prove at the trial the facts from which this new contract should be implied.[1]

(ii.) Next, as a rule, the plaintiff must show that he has himself performed his part of the contract, or so much of it as is necessary to create any liability in the defendant. The *primâ facie* rule is this—that, where the parties have entered into an express bilateral contract by which they still are bound, and which contains no provision to the contrary, the plaintiff must perform his part of the contract before he can sue the defendant for omitting to perform his part. Where, for instance, a man contracts to do a specific piece of work for a lump sum, he can recover nothing till that work is done, even though the non-completion be due to no fault of his. It is one entire contract which cannot be divided, and the remuneration promised on completion cannot be apportioned as the work proceeds.

In other cases, however, it may be necessary to inquire whether the performance due under the contract is or is not divisible. This is a question which it is not always easy to answer. It must be solved, not by technical rules, but by ascertaining, if possible, the intention of the parties. Their intention must, of course, be deduced primarily from the language which they have used in framing their contract. The parties may have stipulated that the performance of some apparently trivial matter shall be a condition precedent, so that non-performance of it shall discharge the contract. "Or they may have intended that the performance of some matter apparently of essential importance, and *primâ facie* a condition

[1] See Order XIX., rr. 20, 24, and Order XXI., r. 3.

precedent, is not really vital, and may be compensated for in damages. And if they sufficiently expressed such an intention, it will not be a condition precedent."[1] If it is expressly provided by the contract that the breach of a particular clause in it shall avoid the whole contract, it will have that effect, unless the Court can see its way to decide that such a provision is unreasonable and unfair. But the judge will look not only at the expressed terms of the contract, but also at the nature of the services to be rendered, at the usual incidents of contracts of this class, and at all other surrounding circumstances that are material. He must then decide whether the parties did or did not intend that performance of, or readiness to perform, one side of the contract should be a condition precedent to the right to demand performance of the other side. If it was so intended no action lies without proof of complete performance or readiness to completely perform. Often, however, the judge may come to the conclusion that the parties did not intend their mutual promises to be so interwoven and involved, but that they made two wholly distinct and collateral promises, which might be independently performed. In that case each can sue if the other breaks his promise without proving the performance of his own promise.

Thus, if A. agrees to sell certain goods to B. for 50*l.* and B. agrees to pay A. 50*l.* for them, these two promises make one contract, which is entire and indivisible. But if a lease contains a covenant by the tenant to pay the rent on the usual quarter days, and also a covenant by the landlord to do certain repairs to the demised premises, the landlord can sue for any arrears of rent without proving that he has executed the repairs; for the covenants here are absolutely independent of each other.

So with contracts for work and labour done. Whenever the nature of the job is such that the work will be of little or no value to the employer until it is finished, there the plaintiff cannot in the absence of a special agreement recover any remuneration until the job is finished. Thus, if the plaintiff has agreed to build for A. a stable for a lump sum of 200*l.* and stops work before he has roofed the building in, he can recover nothing, as the four walls open to the sky are of no use whatever to A. The whole object and essence of the contract was to have a stable in a completed state, hence it is not inequitable for A. to insist on his legal right and refuse to make any payment until the work is finished. It is, however, usual

[1] *Per cur.* in *Bettini* v. *Gye* (1876), 1 Q. B. D. at p. 187.

in building contracts on a larger scale to insert an express clause entitling the builder to receive from time to time under a certificate of the architect 80 per cent. of the value of the work already done. For each such instalment the builder can sue separately; the remaining 20 per cent. remains in the hands of the building owner and is called "retention money."

The rule that a plaintiff must complete his part of a contract before he can sue the defendant for the non-performance of his part has been acted upon in several reported cases. Thus, a man, who contracted to make certain old chandeliers complete for ten pounds, was held unable to recover anything when his services, though valuable, had not yet made the goods complete.[1] And where a man agreed to serve as second mate on a voyage for a lump sum of thirty guineas, and died before the voyage was over, his executors were unable to recover anything on a *quantum meruit*.[2] So also where a man, having contracted for a lump sum to put up specific buildings on the defendant's land, abandoned the contract before completion, it was held that he could recover nothing from the defendant, who had completed the buildings himself.[3] A servant dismissed for good cause cannot recover from his master in respect of the current period of service left incomplete by the dismissal.[4]

But to this *primâ facie* rule there are many exceptions, in which an action will lie although there has been only a partial performance on the part of the plaintiff. The rights of the parties in such a case depend upon the circumstances which have prevented the completion of the contract. It still, however, remains the general rule that a party, who has omitted or refused to fully perform his contract, cannot claim to be paid even for the portion which he has performed, unless he was prevented by the other party from doing the whole, or unless there is a provision in the contract or a custom of the trade entitling him so to do.[5]

So, too, it is possible that performance of the contract by a third party may amount to performance by the contractor himself, but not in the case of contracts involving special personal qualifications in the contractor.

The contractor "cannot vouch the capacity of another to perform that which the other party to the contract might, however unreasonably, insist was what alone he undertook to pay for, namely, work to be executed by

[1] *Sinclair* v. *Bowles* (1829), 9 B. & C. 92.
[2] *Cutter* v. *Powell* (1795), 6 T. R. 320.
[3] *Sumpter* v. *Hedges*, [1898] 1 Q. B. 673.
[4] See *post*, Chap. XII., Master and Servant.
[5] *Roberts* v. *Havelock* (1832), 3 B. & Ad. 404.

the party himself. If, for instance, he had ordered a painting from some unknown artist of his own choice, he could not be compelled to accept instead of it the work of another artist, however eminent."[1]

But where there is a trading contract for the supply of coal or other materials, if the merchant gets what he wants under the contract, and it does not matter who in fact supplies the materials, it may be reasonable to allow the other party to perform its obligations by deputy.[2] So, where the British Waggon Company agreed to let railway waggons to Lea & Co. for a term of years at a certain rent and to repair the waggons, and subsequently assigned their business to another company who duly kept the waggons in repair, it was held that the British Waggon Company "fulfilled its obligations under the contract by finding a new company (assignee of the contract) able and willing to execute the repairs which the old company contracted to perform."[3]

Again, where work has been done or goods supplied under a special agreement, but not in accordance with it, compensation may be claimed if the defendant has retained and enjoyed the benefit of the plaintiff's work or goods; for by so doing he has ratified the substitution. Moreover, if there be a contract void for want of writing under the Statute of Frauds, from the part performance of which by the plaintiff the defendant derives a benefit, he is often liable, not upon the original contract, but upon a fresh agreement implied by law in substitution for it. He must pay for the benefit which he has received;[4] or, in the language of the old pleaders, he is liable on a *quantum meruit*—that is, for "so much as the plaintiff has earned." So, too, in spite of the rule that a corporation is only bound by a contract under seal,[5] it is now clear law that, where a plaintiff is employed by a corporation under a parol contract or one in writing merely, the corporation will be liable on a *quantum meruit*, if the plaintiff has fully performed his part of it and the corporation has received and accepted the benefit of such performance—and this although the original contract cannot be enforced by either party.[6]

[1] *Per* Collins, M. R., in *Tolhurst* v. *Associated Portland Cement Manufacturers*, [1902] 2 K. B. at p. 669.

[2] See the remarks of Cozens-Hardy, L. J., *ib.* at pp. 678, 679.

[3] *British Waggon Co.* v. *Lea & Co.* (1880), 5 Q. B. D. 149; cited with approval by Cozens-Hardy, L. J., [1902] 2 K. B. at p. 679.

[4] *Mavor* v. *Pyne* (1825), 3 Bing. 285.

[5] See *ante*, p. 664.

[6] Except, of course, where there is an express statutory provision to the contrary, as in the case of contracts by urban authorities; see *Young* v. *Mayor, &c., of Leamington* (1883), 8 App. Cas. 517.

Where the defendant had verbally promised to pay the plaintiff—a woman by whom he had had seven illegitimate children—300*l.* a year by equal quarterly instalments for so long as she should maintain and educate the children, it was held that he was liable although the contract was not in writing; for his children had been maintained and educated by the plaintiff at his request.[1]

Where goods which a corporation has contracted by parol to buy have been received by it, or after work is done and adopted for the purposes of the corporation, the objection that the contract was not under seal cannot be taken.[2]

But the right of action upon a *quantum meruit* cannot arise so long as the original contract is still "open," *i.e.*, is unperformed and still binding on the parties to it. Where the contract is entire the plaintiff cannot so recover unless:—

(*a*) the defendant has prevented the plaintiff from performing his part of the contract, or has made such default in the performance of his own part as will exonerate the plaintiff from performing his part; or

(*b*) the plaintiff has done extra work of which the defendant has adopted the benefit, in which case there is deemed to be an implied contract to pay for the extra work.

Where an author contracted to write a book on Ancient Armour for a series which the publishers subsequently abandoned, it was held that as the defendants had broken the special contract he might succeed on a *quantum meruit*.[3] "If a man agrees to deliver me one hundred quarters of corn, and, after I have received ten quarters, I decline taking any more, he is at all events entitled to recover against me the value of the ten that I have received."[4]

(iii.) Next the plaintiff must prove that the defendant has broken his contract. If the contract has not named any time within which the defendant must perform his part, he must be allowed a reasonable time for such performance, and no action will lie until such reasonable time has elapsed. Even if a date be fixed by the contract for the performance of his promise, still it may be a question whether that date can be rigidly insisted upon. Time is not always of the essence of a

[1] *Knowlman* v. *Bluett* (1873), L. R. 9 Ex. 1, 307.
[2] *Sanders* v. *St. Neots Union* (1846), 8 Q. B. 810.
[3] *Planché* v. *Colburn* (1831), 8 Bing. 14; and see *Ogdens, Ltd.* v. *Nelson*, [1905] A. C. 109.
[4] *Per* Best, C. J., in *Mavor* v. *Pyne* (1825), 3 Bing. at p. 288.

contract, as, for instance, in a contract for the sale of land or in one for the sale of goods, "unless a different intention appears from the terms of the contract."[1] But to apply this principle "to mercantile contracts would be dangerous and unreasonable."[2] Thus in the case of a contract for the sale of a public-house "as a going concern,"[3] or of the goodwill of a business or of goods of a perishable character, it is clear that time is of the essence of the contract.[4]

Even where time is not originally of the essence of the contract, the law grants protection against unreasonable delay in performance. Where one party has omitted to perform his promise, the other may give him notice that if he does not do so by a certain date he will treat the delay as a breach of contract. But the date fixed must be one which under all the circumstances of the case allows a reasonable time for the completion of what remains to be done.

Whether the defendant's conduct amounts to a breach of his contract must depend upon the precise nature of the contract and the circumstances of the particular case. In some cases, however, it is sufficient if the plaintiff can show that the defendant has unequivocally announced that, when the time comes for performance, he will break the contract. Where there is such a renunciation by the defendant before performance on his part is due, the plaintiff is discharged and entitled at once to treat the contract as broken and to sue for the breach of it. Or, if he prefers, he may wait till the day fixed for performance, thus giving the defendant a *locus pœnitentiæ*. In the latter case, however, the contract remains in existence for the benefit and at the risk of both parties; so that, should it from any other cause be discharged before the day fixed for performance, the defendant will be released from liability.

Where one party has elected not to perform the contract on his part, it is competent for the other party to say: "I take you at your word: the agreement shall be put an end to

[1] 56 & 57 Vict. c. 71. s. 10. See *ante*, p. 668.
[2] *Per* Cotton, L. J., in *Reuter* v. *Sala* (1879), 4 C. P. D. at p. 249, *post*, p. 787.
[3] *Day* v. *Luhke* (1868), L. R. 5 Eq. 336; *Cowles* v. *Gale* (1871), L. R. 7 Ch. 12.
[4] *Hudson* v. *Temple* (1860), 29 Beav. 536.

altogether, I retaining my right to sue you for the breach."[1] So where there is renunciation during the course of performance, the other party is discharged and entitled to sue at once for breach of contract.[2]

A traveller engaged a courier at 10*l.* a month for a period beginning on the first of June. Before that date he told the courier he should not require his services. It was held that the courier's right of action accrued at once upon the renunciation, and he need not wait till June to sue.[3] A man made a promise to marry a woman upon the death of his father: he then renounced the promise while his father was still alive. It was held that the woman could sue immediately without waiting for the father's death.[4] A similar right of action accrued immediately where a man promised to marry X. on a certain date, and married Y. before that date arrived.[5]

A railway company, having contracted to purchase 3,900 tons of railway chairs at a fixed price, gave notice to the vendor, after he had supplied less than half the amount, that they would not require any more. It was held that he could sue without actual delivery of the whole, and need only show that he was willing to have made full performance.[6]

(iv.) It is not necessary for the plaintiff to show that he has sustained any actual pecuniary loss through the defendant's breach of contract. Breach of contract is in itself an actionable wrong, irrespective of damage; consequently the plaintiff can recover nominal damages for the mere breach, even if he has suffered no loss thereby. If he can prove that he has suffered loss from the breach, he may recover substantial damages.[7] In this case the plaintiff must specifically allege such special damage in his pleading and prove it at the trial. He must also satisfy the Court that the loss is the natural and reasonable result of the breach and that the damage is not too remote; and then the jury will assess the amount of compensation to which he is entitled.

The parties may have stipulated that a specific sum shall be recoverable in the event of a breach of contract. This sum may represent "liquidated damages"; that is to say, the

[1] See *General Billposting Co., Ltd.* v. *Atkinson*, [1908] 1 Ch. 537, and the remarks of Buckley, L. J., at p. 545.
[2] See *Boston Deep Sea, &c., Co.* v. *Ansell* (1888), 39 Ch. D. 339, 365.
[3] *Hochster* v. *De la Tour* (1853), 2 E. & B. 678.
[4] *Frost* v. *Knight* (1872), L. R. 7 Ex. 111.
[5] *Short* v. *Stone* (1846), 8 Q. B. 358.
[6] *Cort* v. *Ambergate Ry. Co.* (1851), 17 Q. B. 127.
[7] See *post*, Book VI., Chap. XX., Damages and the Measure of Damages.

parties may accept it in place of the amount which a jury might assess, and the jury cannot at the trial award a larger or smaller amount. Or it may be a "penalty," in which case the plaintiff can recover for such damage only as he can prove that he has suffered, which may be much less than the amount of the penalty.[1] The fact that the parties may in their contract have described a sum as either "liquidated damages" or "penalty" is by no means conclusive of its character.

*Defences to an Action of Contract.*

A great variety of defences are open to a defendant in an action of contract. We will assume that the plaintiff has established a *primâ facie* case; we will also assume that the contract on which he relies is neither void on the ground of illegality nor voidable on the ground of fraud or of want of capacity in either party.[2] Apart from these the most usual and obvious defences are:—

(i.) that the defendant has fully performed his part of the contract;

(ii.) that it was impossible for the defendant to perform his part of the contract;

(iii.) that the plaintiff has prevented the defendant from performing his part of the contract;

(iv.) that the contract was, before any breach of it, rescinded by mutual consent, or varied by a new agreement between the parties, or determined by operation of law;

(v.) that before any breach on the part of the defendant the plaintiff exonerated and discharged him from performing his part of the contract by making default in performing his own part, or otherwise by his conduct divesting himself of any right to sue thereon;

(vi.) that after the breach of contract on which the plaintiff sues had been committed by the defendant, the plaintiff released or discharged his right of action thereon:—

(a) by a release under seal, or

(b) by an accord and satisfaction.

It will be necessary to deal in detail with each of the above

[1] See 8 & 9 Will. III. c. 11, s. 8; and *post*, Book V., Chap. XX.

[2] As to Coverture, Infancy, Lunacy, see *post*, Book VI., Chaps. I.—III.

defences. The defendant may also, of course, plead a set-off or counterclaim.[1]

(i.) It is, of course, a defence to any action on a contract that the defendant has fully performed his part of it. The burden of this lies on the defendant, but in practice he can often prove the fact by his cross-examination of the plaintiff's witnesses. What amounts to a performance will depend upon the circumstances of each particular case.[2]

Where the defendant's obligation under the contract is merely to pay the plaintiff a sum of money and he holds a written receipt for the full amount payable, the receipt is *primâ facie* evidence of the payment. But a receipt is not conclusive evidence of payment, nor does it act as an estoppel. A man who has given a receipt may show that he gave it by mistake or in consequence of fraud or subject to a condition which has not yet been performed.[3]

In writing a receipt, any form of words will suffice which shows that the debtor is discharged; the mere signature of the vendor attached to a bill or invoice may be enough.[4] But where the receipt is for 2*l.* or upwards (subject to certain exceptions), the receipt must bear a penny stamp, which must be cancelled by the person who receives the money at the time of giving the receipt. The creditor is liable to a fine of 10*l.* if he does not give the debtor a stamped receipt upon payment of such sum.[5] The fact of payment may be proved orally, whether or not a written receipt exists, and whether or not that receipt be duly stamped.[6]

In *Att.-Gen.* v. *Carlton Bank*,[7] the Court discussed the definition of "receipt," and excluded "entries intended merely for the regulation of book-keeping" which "are not regarded as documents of acquittance to the clerk who hands over the money, and are not retained by him."

A barrister's receipt for fees over 2*l.* must be stamped.[8]

Sometimes where a contract is to be discharged by performance in the shape of payment, questions may arise as to the appropriation of payments. One man may owe another different sums for debts contracted at different times, on

[1] See *post*, Book V., Chap. XVI.
[2] See *ante*, pp. 737–739.
[3] See *Lee* v. *Lancs. and Yorks. Ry. Co.* (1871), L. R. 6 Ch. 527.
[4] See *Spawforth* v. *Alexander* (1798), 2 Esp. 621.
[5] See the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 100.
[6] *Rambert* v. *Cohen* (1803), 4 Esp. 213.
[7] [1899] 2 Q. B. 158, 165.
[8] *General Council of the Bar* v. *Inland Revenue*, [1907] 1 K. B. 462.

different considerations, and secured in different ways. For example, A. may owe B. money on a mortgage or a covenant, or on a bond or a bill of exchange, or as a joint debtor, or as a debtor with a surety who is liable on his default. Then, if A. pays B. a sum which is not enough to extinguish all his debts, A. has the right to "appropriate" the payment to the satisfaction of any particular debt. Either before, or during his payment over of the money to B., A. may say "this is for the mortgage debt," or "this is for the debt which I owe jointly with X.," or "for the debt for which Z. is my surety." The creditor would perhaps much prefer another debt, or a debt for which he has only the debtor's own security, to be paid off first; but he cannot prevent the debtor from applying the payment to satisfy any particular debt, so long as the debtor notifies his intention before or at the time of payment.[1] The appropriation by the debtor need not be express, if it can be inferred from his contract or if other circumstances clearly indicate his intention.[2]

But where the money is paid in generally, without any specific appropriation by the debtor, the creditor may apply it to any debt he pleases, the amount of which is agreed and ascertained, even to one barred by the Statute of Limitations.[3] The creditor is not obliged to apply the money to any particular debt on receiving it; he may appropriate it "up to the very last moment,"[4] even while giving evidence in the witness box.[5]

The creditor may make his appropriation either by express words or by any method which shows his intention, for example, by the form in which his action is brought.[6] If he decides to appropriate the money to a particular debt by a private entry in his own books uncommunicated to the debtor, he can afterwards change his mind and apply it to some other debt.[6] But once he has signified his appropriation to the

[1] See *Mayfield* v. *Wadsley* (1824), 3 B. & C. at p. 362.
[2] *Newmarch* v. *Clay* (1811), 14 East, 239.
[3] *Mills* v. *Fowkes* (1839), 5 Bing. N. C. 455.
[4] *Per* Lord Macnaghten, in *The Mecca*, [1897] A. C. at p. 294.
[5] *Seymour* v. *Pickett*, [1905] 1 K. B. 715; and see *Philpott* v. *Jones* (1834), 2 A. & E. 41.
[6] *Simson* v. *Ingham* (1823), 2 B. & C. 65.

debtor either expressly or by the form in which his action is brought, he cannot afterwards change it.[1] Naturally, the creditor will generally apply the payment to satisfy the oldest unsecured simple contract debt for which the debtor alone is liable.

In the absence of circumstances indicating intention, the law will not apply money, which has been paid generally, towards the discharge of a secured debt in favour of a surety.[2] But a creditor may not, when there is a legal debt unpaid, appropriate the payment to an illegal debt.[3]

If neither debtor nor creditor appropriate the money paid to any specific debt, the law will apply the payment first to discharge any interest that may be due, and next to satisfy the oldest outstanding unpaid debt, unless there are circumstances to show that such could not have been the intention of the parties.[4] There may be circumstances to show that the creditor reserved his right to appropriate.[5]

Sometimes the tender or offer of performance is a sufficient discharge of the contract. Thus, if a man contracts to deliver goods and tenders them according to the contract, he is discharged; for he has done all in his power to perform his contract. If the goods are refused, he can bring an action for the non-acceptance of them, and he has a good defence to an action for non-delivery.[6] So if a man is liable to pay a definite sum of money,[7] he will be discharged if before action brought he tenders to the plaintiff that sum of money, or subsequently, when sued, pays the money into court. His tender will prevent the further accrual of interest on the sum due.[8]

Such tender must be for the whole amount due. Tender of a larger sum may be good, but the debtor cannot ask for change. An offer of five pound

[1] *Friend* v. *Young*, [1897] 2 Ch. 421.
[2] *In re Sherry* (1884), 25 Ch. D. 692.
[3] *Wright* v. *Laing* (1824), 3 B. & C. 165.
[4] *Clayton's Case* (1816), 1 Mer. 572. See the remarks of Blackburn, J., in *City Discount Co.* v. *McLean* (1874), L. R. 9 C. P. at p. 701; and *Hooper* v. *Keay and Draper* (1875), 1 Q. B. D. 178.
[5] *The Mecca*, [1897] A. C. 286.
[6] 56 & 57 Vict. c. 71, s. 37; see *post*, p. 796.
[7] A plea of tender cannot strictly be pleaded to actions for unliquidated damages, whether in contract or in tort: *Davys* v. *Richardson* (1888), 21 Q. B. D. 202.
[8] *Dent* v. *Dunn* (1812), 3 Camp. 296; *Griffiths* v. *School Board of Ystradyfodwg* (1890), 24 Q. B. D. 307.

notes of the Bank of England is a valid tender for any sum above 5*l.*; current gold coins of the realm are good tender to any extent, but a man need not accept more than forty shillings in silver money nor more than a shilling in copper.[1] Giving a cheque is payment only if the cheque be honoured; in the absence of a special agreement, such payment is conditional.[2] Till the cheque has been presented and dishonoured (if the debtor does not previously stop the cheque), it suspends the right of action on the debt.[3] Where a bill of exchange was offered and taken in payment of rent, it was held to be evidence of an agreement not to distrain until the bill fell due.[4]

(ii.) Contracts may be discharged if, after they are made, it becomes impossible to perform them, provided that the impossibility is not created through the default of one of the parties. If the parties contract on the basis of the continued existence of a particular thing, the destruction of that thing may discharge them if it happens through the fault of neither. Contracts to give personal services are discharged if death or incapacitating illness renders it impossible to perform them.

Where A. contracted to let B. a hall for the purposes of an entertainment, and the hall was accidentally burnt down before the time arrived for the entertainment, it was held that the contract was discharged.[5] Where a man contracts to sell specific goods, if they have at the time already ceased to exist, the contract is void under the Sale of Goods Act, 1893.[6] And if after such a contract "the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided."[7]

A contract to play the piano at a concert or to sing in an opera would fall under this rule, for it is "a contract to perform a service which no deputy could perform, and which in case of death could not be performed by the executors of the deceased." Consequently, "by virtue of the terms of the original bargain, incapacity of body or mind in the performer, without default on his or her part, is an excuse for non-performance. Of course the parties might expressly contract that incapacity should not excuse, and thus preclude the condition of health from being annexed to their agreement."[8]

A contract to marry is discharged when performance becomes impossible through the death of one of the parties. Serious illness of one party would

[1] 33 Vict. c. 10, s. 4.
[2] *Robinson* v. *Read* (1829), 9 B. & C. 449.
[3] *Charles* v. *Blackwell* (1877), 2 C. P. D. 151; *Elliott* v. *Crutchley*, [1903] 2 K. B. 476; [1904] 1 K. B. 565; [1906] A. C. 7.
[4] *Palmer* v. *Bramley*, [1895] 2 Q. B. 405.
[5] *Taylor* v. *Caldwell* (1863), 3 B. & S. 826.
[6] 56 & 57 Vict. c. 71, s. 6.
[7] *Ib.*, s. 7. As to when the risk passes, see s. 20, *post*, p. 792.
[8] *Per* Bramwell, B., in *Robinson* v. *Davison* (1871), L. R. 6 Ex. at p. 277.

seem to excuse the other; "it would be most mischievous," said Lord Kenyon, "to compel parties to marry who can never live happily together."[1] Nevertheless, where a man, sued for breach of promise to marry, pleaded that since the promise he had become totally unfit for marriage by reason of dangerous illness of the lungs, the judges held that this was no defence, as the plaintiff might desire the position in life of his wife or widow.[2]

Contracts which are physically impossible, or patently absurd, are void. The parties would be held not to have seriously intended to make a valid contract. But since a man is not obliged to make an absolute promise, an absolute promise may be held to bind him.

Thus a tenant, who covenants to repair or to pay rent, is not discharged from his contract if the premises are accidentally destroyed, or if the King's enemies keep him out of possession. "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract, and therefore if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it."[3]

If under a charter-party a merchant makes an absolute contract to load a certain cargo in a certain place and time, it is no defence for him to plead that performance became impossible through frost,[4] or a dock strike,[5] or an epidemic.[6]

It is essential to consider whether the parties to a contract have impliedly agreed that its performance shall be conditional upon the continuance of the possibility of performance, or whether they have contracted absolutely and run the risk of impossibility of performance. In the latter alternative, the promisor is taken to have warranted the possibility of performance, there being apparently no general legal presumption that impossibility shall excuse him.

When the illness of King Edward VII. in 1902 made it impossible to carry out the coronation ceremony and procession, several contracts came before the Courts in which

[1] *Atchinson* v. *Baker* (1797), Peake, Add. Cas. at p. 105.
[2] *Hall* v. *Wright* (1858), E. B. & E. 746.
[3] *Paradine* v. *Jane* (1646), Aleyn, 26, 27; and see *Avery* v. *Bowden* (1855), 6 E. & B. 953.
[4] *Kearon* v. *Pearson* (1861), 31 L. J. Ex. 1.
[5] *Budgett* v. *Binnington*, [1891] 1 Q. B. 35.
[6] *Barker* v. *Hodgson* (1814), 3 M. & S. 267. It is difficult to distinguish the decisions in *Hills* v. *Sughrue* (1846), 15 M. & W. 253, and in *Clifford* v. *Watts* (1870), L. R. 5 C. P. 577. See *ante*, p. 720.

the parties had agreed to let and hire rooms and seats for viewing the procession. The decision cited above,[1] where a contract for hiring a hall was discharged by the accidental burning of the hall, was followed in these cases; and it was held that no action lies where "a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time."[2] Though the actual agreement was for the hire of a room and the performance of this was not made impossible by the King's illness, it was held that the contract was impliedly conditional on the procession taking place.[3] Since therefore neither plaintiff nor defendant could recover on the avoided contract, each had to bear the loss which he had himself incurred. But where the contract appeared to contemplate the risk of supervening impossibility, it was not discharged.[4]

Cases of impossibility of performance are sometimes also covered by the law applicable to contracts made under the mutual mistake of the parties.[5]

(iii.) *A fortiori* it will be a defence to an action for breach of contract if the defendant can show that the plaintiff himself rendered it impossible for the defendant to perform his part of it, or in any other way prevented the defendant from doing so. There may be many valid excuses for this kind of non-performance, *e.g.*, if the defendant undertook to paper the plaintiff's house and the plaintiff subsequently locked the doors and would not permit the defendant to enter the premises.

(iv.) Again, it is always open to a defendant to show that the contract upon which he is sued had come to an end before the date of his alleged breach of it. And he may show this either by proving—

(a) that the contract had been rescinded as a whole; or

[1] *Taylor* v. *Caldwell* (1863), 3 B. & S. 826; *ante*, p. 748.
[2] *Per* Vaughan Williams, L. J., in *Krell* v. *Henry*, [1903] 2 K. B. at p. 754.
[3] See also *Civil Service Society* v. *General Steam Navigation Co.*, [1903] 2 K. B. 756; *Chandler* v. *Webster*, [1904] 1 K. B. 493.
[4] *Herne Bay Steam Boat Co.* v. *Hutton*, [1903] 2 K. B. 683; *Elliott* v. *Crutchley*, [1906] A. C. 7.
[5] *Scott* v *Coulson*, [1903] 2 Ch. 249.

(b) that a new agreement had been made between the parties, altering the original contract in such a way as to justify the defendant in what he had done or omitted to do; or

(c) that the contract had been determined by operation of law.

The parties to a contract may always agree to rescind it. A parol agreement to rescind it will bind them, even though the contract be in writing and is required by law to be in writing.[1] A contract cannot, of course, be rescinded without the consent of both parties. The consideration for the consent of each party is his release by the other from all future obligation under the contract. But in the absence of express stipulation the rescission of a contract will not affect a vested right of action for a previous breach of it. A rescission will not be a good defence to the action, unless it was effected before the defendant had committed the breach for which he is now sued.

Again, it is competent to the parties to a contract at any time before breach of it to add to, subtract from or vary the terms of it by a new contract. The substituted contract forms a good defence to an action brought for a subsequent breach of any term of the previous contract which has been altered by it, and it is not necessary for the defendant to allege that the substituted agreement has been performed or satisfied, as he must do if the action be brought after breach.[2] But if the original contract was of a kind required by law to be in writing, the agreement varying it must also be in writing, otherwise the parties would be bound by a contract partly in writing and partly oral.[3]

The terms of the contract may provide for its determination by some prescribed method. It may contain a stipulation that in certain events the parties shall be released. There may be a "condition precedent"—a stipulation that the contract shall not be valid unless a certain provision in it be fulfilled; or there may be a "condition subsequent," so that the contract is valid unless a certain event occurs. For example, when a charter-party expressly excepts certain risks by fire or war, the contract will be

[1] *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634.
[2] See *Patmore* v. *Colburn* (1834), 1 C. M. & R. 65; and *post*, pp. 756, 757.
[3] *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58, 65.

discharged by the condition subsequent of a fire or a war breaking out. Similarly a contract may expressly provide for its own discharge at the option of one of the parties—for example, if an employer engages a workman under an agreement which provides that the period of service may be ended if either of them gives a month's notice to the other.

Formerly at common law, as we have seen,[1] a contract under seal could be discharged only by a deed. Equity, however, broke through this rule, and it is now a good defence to an action on a deed to plead a verbal agreement to discharge the original contract under seal, provided it was made for good consideration.

A contract may also be discharged—so far as its original parties are concerned—by Novation, where a new debtor takes over the liability of the old debtor and is accepted by the creditor in place of, and to the release of, the old debtor. A novation must be distinguished from an assignment of a contract; the latter will be dealt with in the next chapter. "Novation, as I understand it," said Lord Selborne,[2] "means this—that there being a contract in existence, some new contract is substituted for it, either between the same parties (for that might be) or between different parties, the consideration being the mutual discharge of the old contract. A common instance of it in partnership cases is where upon the dissolution of a partnership the persons who are going to continue in business agree and undertake, as between themselves and the retiring partner, that they will assume and discharge the whole liabilities of the business, usually taking over the assets; and if in that case they give notice of that arrangement to a creditor,[3] and ask for his accession to it, there becomes a contract between the creditor who accedes and the new firm to the effect that he will accept their liability instead of the old liability, and on the other hand that they promise to pay him for that consideration."

And apart from novation the parties may by express subsequent agreement vary some of the terms of the original contract, leaving the rest still in force. Any term in the original contract, which is inconsistent with those subsequently added, will no longer bind the parties. There is one exception—a verbal agreement to vary the terms of a contract will be invalid if the contract when so varied is of such a nature that it is required by law to be in writing.[4]

But if one party merely allows the other party additional time for performance, this will not amount to a new contract and need not therefore be in writing.[5]

A contract may also be determined by operation of law. Thus by the law of bankruptcy, if a bankrupt obtains an order of discharge, he is released from all liabilities provable

[1] *Ante*, p. 669.
[2] *Scarf* v. *Jardine* (1882), 7 App. Cas. at p. 351.
[3] See the Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 17 (3); and *post*, p. 853.
[4] *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58; *Mercantile Bank of Sydney* v. *Taylor*, [1893] A. C. 317; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634.
[5] *Hickman* v. *Haynes* (1875), L. R. 10 C. P. 598, 606.

under the bankruptcy.[1] Again, the doctrine of merger may determine a contract, as for instance, where a right of action on a simple contract is extinguished by judgment recovered.[2] So, too, a change in the law may discharge a contracting party from liability.

For example, a lessor covenanted that neither he nor his assigns would build any other than ornamental buildings upon his land adjacent to the land leased. An Act of Parliament empowered a railway company to take the adjacent land, and a railway station was built upon it. This discharged the lessor from his covenant.[3]

A declaration of war may have similar effect, since certain trading contracts may thus become contracts with the King's enemies.[4]

(v.) We have already dealt with the case in which one party to a contract has unequivocally announced his intention of not performing his part of it, and we have seen that in such a case the other party is entitled to treat such renunciation as an offer to rescind the contract—an offer which he may at once accept.[5] He may thereupon signify to the other party that he will treat the contract as determined, and after that he cannot be sued for any subsequent breach.

But it is a somewhat different case that usually occurs. It generally arises where the contract in question requires the plaintiff to perform a series of acts, such as to deliver goods by instalments or to do certain work whenever he is required so to do. In such cases it is seldom that the plaintiff says in so many words, "I am not going to keep my promise," but as a matter of fact he does not keep it. The question then arises, How long must this state of things continue? Must the defendant submit to repeated breaches of contract which disarrange his business and prevent him from carrying out his contracts with others? There must come a time when the defendant will be entitled to say to the plaintiff, "I can no longer go on like this; I shall have nothing more to do with you; I renounce my contract with you; I will make a fresh contract

[1] See *post*, Book VI., Chap. IV., Bankruptcy.
[2] See *ante*, pp. 661, 662.
[3] *Baily* v. *De Crespigny* (1869), L. R. 4 Q. B. 180.
[4] *Esposito* v. *Bowden* (1857), 7 E. & B. 763; and see *ante*, p. 657.
[5] See *ante*, pp. 742, 743.

with somebody else to supply the goods or to do the work which you neglect to do."

It is only by looking at the facts of each case that one can decide whether there has been such a non-performance by the plaintiff as discharges the agreement. The non-performance by the plaintiff of his part of the contract will only discharge the defendant from his obligation when such non-performance "goes to the root of the contract." In that case, if the plaintiff has shown by his conduct that he does not mean to perform his part of the contract, the defendant has a right to say, "I am not going to perform mine, when that which is the root of the whole contract and the substantial consideration for my performance is defeated by your misconduct."[1] Or, in the language of Lord Coleridge, C. J.,[2] "the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract. . . . Where by the non-delivery of part of the thing contracted for the whole object of the contract is frustrated, the party making default renounces on his part all the obligations of the contract." In other cases the plaintiff's non-performance merely gives the defendant a right to compensation, which will be ground for a cross-action or counterclaim.

In cases where the contract provides for the delivery of goods or the payment of their price by instalments, the non-delivery or non-payment of one instalment is generally not sufficient to discharge the other party wholly from the contract.[3] Under the Sale of Goods Act, 1893,[4] a purchaser of goods is not bound to accept delivery of them by instalments unless it has been otherwise agreed. Where there is a contract for delivery by instalments to be separately paid for, and where default is made either by the seller in delivery or by the buyer in payment, the decisions have varied. Sometimes it has been held that there has been a severable breach giving rise to a claim only for compensation;[5] in other cases failure to deliver a first instalment[6] and failure to accept instalments[7] has been held to discharge the contract.

[1] See the remarks of Lord Blackburn in *Mersey Steel and Iron Co.* v. *Naylor* (1884), 9 App. Cas. at pp. 443, 444.

[2] *Freeth* v. *Burr* (1874), L. R. 9 C. P. at pp. 213, 214.

[3] *Freeth* v. *Burr* (1874), L. R. 9 C. P. 208; and see *Jonassohn* v. *Young* (1863), 4 B. & S. 296.

[4] 56 & 57 Vict. c. 71, s. 31; see *post*, p. 795.

[5] *Simpson* v. *Crippin* (1872), L. R. 8 Q. B. 14; *Braithwaite* v. *Foreign Hardwood Co.*, [1905] 2 K. B. 543.
*Hoare* v. *Rennie* (1859), 5 H. & N. 19.
*Honck* v. *Muller* (1881), 7 Q. B. D. 92.

Again, if the defendant can prove that the plaintiff has absolutely assigned the contract, he will have a good defence to the action; for the plaintiff has voluntarily divested himself of his right of action. So, too, the plaintiff's right of action may be suspended by his accepting a bill of exchange or promissory note in payment of the debt; he cannot sue during the currency of that bill or note. Or the defendant may be in a position to contend that the plaintiff is estopped from bringing the action either by deed or by conduct, or that the plaintiff had for good consideration agreed to forbear from suing the defendant either absolutely or for a specified period.[1]

The law looks with disfavour upon any alteration of a written agreement; it will not therefore permit a plaintiff, who has altered a contract in a material particular without the consent of the other party, to enforce it against that other party, even though the original words are still legible.[2] Again, if the written contract is in the custody of the plaintiff, and he either permits a stranger to alter it or by his negligence puts it in the power of a stranger to alter it, he can no longer sue upon that contract. If, however, the alteration be made by a stranger against the will and in fraud of the party who had the custody of the document, the better opinion is that the contract is not invalidated and that either party can sue upon it.[3] The rights of the defendant under the contract will not be affected by any alteration made without his consent by the plaintiff or by anyone for whose acts the plaintiff is responsible, while the document is in the custody of the plaintiff.

If the alteration be made inadvertently, *e.g.*, if the seals were accidentally torn off a deed,[4] the agreement will remain good in its original form. So an alteration to which the parties consent, for the purpose of correcting a mistake in the document, will not make the contract void.[5] But if the plaintiff has the custody of the written contract and without the consent of the defendant intentionally makes a material alteration in it, this will

[1] See *Foakes* v. *Beer* (1884), 9 App. Cas. 605.
[2] *Pigot's Case* (1614), 11 Rep. 26 b.
[3] See the remarks of Lord Herschell in *Lowe* v. *Fox* (1887), 12 App. Cas. at p. 217.
[4] *Argoll* v. *Cheney* (1625), Palmer, 402. See *Henfree* v. *Bromley* (1805), 6 East, 309.
[5] See *In re Howgate's Contract*, [1902] 1 Ch. 451.

avoid the contract as against the defendant, even though the alteration was made in good faith and under a mistake of law as to the legal effect of the document.[1]

Where a promissory note "I promise to pay E. A. the sum of £125" was altered so as to run "On demand I promise to pay . . ." the alteration was held immaterial and the contract was not discharged.[2] But alteration of the number of a Bank of England note was held to invalidate the note.[3] There will be a discharge of the contract if there has been an alteration of the instrument in a material way ; but a material alteration will not avoid a bill as against a holder in due course "if the alteration is not apparent."[4]

(vi.) We have already dealt with the case in which the original contract is terminated by a new agreement before any breach of it has been committed. Different considerations apply to any new agreement or rescission which is alleged to have taken place after a breach of the original contract has been committed. Immediately on such breach a right of action vests in the plaintiff, which can only be discharged by an accord and satisfaction, or by an express release under seal.[5]

When there has been no performance and a right of action has consequently accrued to one party, the other party may offer a different performance or other amends,[6] which, if accepted and executed, will discharge his liability under the contract. This is called "accord and satisfaction"; accord without satisfaction is no defence, nor is satisfaction without accord.

When the parties before any breach agree to cancel or modify their contract by a subsequent agreement, the release of one party is, as we have seen, a sufficient consideration for the release of the other. Hence an accord before breach, if it discharges or varies the original contract, must amount either to a rescission or to a new agreement, and will therefore be a good defence to an action brought on any alleged subsequent breach without proof of any performance or satisfaction. But an accord after

[1] *Bank of Hindostan, &c.* v. *Smith* (1867), 36 L. J. C. P. 241.
[2] *Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 573.
[3] *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555.
[4] 45 & 46 Vict. c. 61, s. 64. See *Leeds and County Bank* v. *Walker* (1883), 11 Q. B. D. 84 ; and *post*, pp. 829, 830.
[5] There is one exception—the holder of a bill of exchange or promissory note can waive his rights without any consideration, provided either that the bill be delivered up to the acceptor or that the waiver be expressed in writing : 45 & 46 Vict. c. 61, s. 62, and see *post*, p. 831.
[6] See for instance, *Boosey* v. *Wood* (1865), 3 H. & C. 484.

breach stands on a different footing ; for then the defendant cannot be discharged from liability without some further consideration being given, unless there be a release under seal.[1] A subsequent rescission of the contract will not affect a right of action for breaches already committed.

Where performance is to be by payment of a sum of money, payment of a smaller sum is not in itself a proper satisfaction of the liability ; there must be some consideration for the relinquishing of the balance. But payment of a smaller sum at an earlier date than the date agreed, or in a different place, may be a valid satisfaction.[2] And a negotiable instrument for a less amount may be a good discharge,[3] if given and accepted for the purpose.[4] Where several creditors agree with a debtor to accept a composition for the money he owes them, this also may be a good discharge.[5]

An accord and satisfaction cannot strictly be pleaded to an action brought on a contract under seal.[6] But if one party to a deed promises for good consideration not to enforce the covenants in that deed which are to be performed by the other party, this will be a good plea to an action for any future breach of those covenants ; and if the consideration for the promise has been performed, this will be a good defence for any previous breaches of those covenants if these were expressly included in the promise.[7]

[1] *Foster* v. *Dawber* (1851), 6 Exch. 839.

[2] See *Pinnel's Case* (1602), 5 Rep. 117 ; *Foakes* v. *Beer* (1884), 9 App. Cas. 605, followed in *Underwood* v. *Underwood*, [1894] P. 204.

[3] *Goddard* v. *O'Brien* (1882), 9 Q. B. D. 37 ; *Bidder* v. *Bridges* (1887), 37 Ch. D. 406.

[4] But see *Day* v. *McLea* (1889), 22 Q. B. D. 610 ; *Nathan* v. *Ogdens, Ltd.* (1906), 94 L. T. 126.

[5] *Good* v. *Cheeseman* (1831), 2 B. & Ald. 328 ; *Dane* v. *Mortgage Insurance Corporation, Ltd.*, [1894] 1 Q. B. 54.

[6] *Mayor, &c., of Berwick* v. *Oswald* (1853), 1 E. & B. 295 ; *Spence* v. *Healey* (1853), 8 Exch. 668.

[7] *Nash* v. *Armstrong* (1861), 10 C. B. N. S. 259.

## Chapter VIII.

### Assignment of Contracts and other Choses in Action.

No one can sue on a contract unless he be either an original party to it, or the lawful assignee of an original party. The benefit of most contracts can now be assigned to a stranger without the consent of the party burdened by it.[1] The burden of a contract, as a rule, cannot be assigned without the consent of the party entitled to the benefit of it, unless some benefit be assigned along with the burden.[2]

This is now clear law. But at common law only the original parties to a contract could sue upon it. The rule was that a chose in action could not be validly assigned; and the right to sue on the contract was a chose in action.

It is necessary in the first place to discuss the meaning of the phrase "chose in action."

#### *Choses in Action.*

"It is difficult to find out the exact meaning of the expression 'chose in action'; . . . it is impossible, I think, to look into the authorities upon this subject without seeing that the meaning attributed to the expression has been expanded from time to time. . . . We all know that our law has not been put into a very scientific shape, and there is often considerable difficulty in determining in what sense a particular expression, such as 'chose in action,' is used."[3]

At first the phrase had a clear and definite meaning, namely, a present right to take proceedings in a Court of law to recover a debt or damages. In this sense it was opposed

[1] *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608.

[2] *Tolhurst* v. *Cement Manufacturers, Ltd.*, [1903] A. C. 414; *Kemp* v. *Baerselman*, [1906] 2 K. B. 604.

[3] *Per* Lindley, L. J., in *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. at pp. 282, 284. And see the remarks of Cotton, L. J., *ib.*, at pp. 276, 277, and of Lord Blackburn, 11 App. Cas. at pp. 439, 440.

to chattels in possession, which were tangible personal property, capable of being stolen or taken in execution. The term is thus defined in "Termes de la Ley":—"Things in action is when a man hath cause, or may bring an action for some duty due to him, as an action of debt upon an obligation, annuity, or rent, action of covenant, or ward, trespasse of goods taken away, beating, or such like, and because that they are things whereof a man is not possessed, but for recovery of them is driven to his action, they are called things in action."[1] So, in March's translation of Brooke's Abridgment the phrase is thus referred to:—"A thing in action, which is personal; as debt, and dammages and the like."[2] A right of action to recover unliquidated damages, whether in contract or in tort, was as much a chose in action as a debt for a fixed amount. But in either case the right had to be vested; the mere possibility that A. might hereafter do or omit to do something which would give B. a cause of action against him was not a chose in action. And this right to bring an action was strictly personal. Only the person who had the right could sue on it; only the person liable could be sued. Neither the benefit nor the burden could be transferred to a third person, a stranger to the original obligation.

As the jurisdiction of the Court of Chancery arose and extended, there came to be equitable choses in action—rights, that is, to sue in equity for relief which could not (before 1875) be obtained in a Court of law. Thus, a legacy was called an equitable chose in action, because, if the executor withheld payment, the only remedy of the legatee was in equity; no action would lie at law for a legacy. And there was this marked distinction between legal and equitable choses in action: the former class were not transferable at common law, but the latter were assignable from one person

[1] Ed. 1641, p. 59. This work, which is of considerable authority, was first published in 1527 under the title *Exposiciones Terminorum Legum Anglorum*. It was probably written by John Rastell the printer, whose son William was a judge of the Queen's Bench in 1558.

[2] Ed. 1651, p. 51. This abridgment was written by Sir Robert Brooke or Broke, who was appointed Chief Justice of the Common Pleas in 1554. He cites 2 Hen. VII. 8; but this cannot be taken to be an absolute authority for the definition.

to another, and the assignee might sue in equity in his own name. Thus the right in equity of a lessee or his assigns to be relieved against a forfeiture is a chose in action.[1]

Originally, then, the term "chose in action" was applied only to a debt, to a claim for damages, to any right to take proceedings either at law or in equity to obtain some other judicial relief, and to any document (such as a bond, bill, promissory note or agreement) which was mere evidence of such a right.[2] It did not include any other incorporeal right or property; and, of course, it included no tangible personal property. It was practically identical with what we now call a right of action. "There was formerly no such thing as an incorporeal chattel personal."[3] But in more modern times there sprang up several species of incorporeal personal property, which were unknown to our ancestors, such as consols, stocks, shares, debentures, patents and copyrights. All these, probably for want of a better classification, are usually called choses in action, though they are in fact personal property of an incorporeal nature. The category of choses in action has in fact been so enlarged that it now includes practically every personal chattel not in possession.

Hence the term "chose in action" is now used to cover a miscellaneous assortment of rights and properties. Thus an annuity, whether in fee or for life or for a term of years, is a chose in action,[4] unless it be charged on land, when it becomes a chattel interest in realty.[5] Stock was spoken of as a chose in action by Lord Thurlow, L. C., as early as 1790,[6] consols were so treated by Sir William Grant, M. R., in 1803,[7] and shares by the Court of Queen's Bench in 1839.[8] Even a ticket in a Derby sweepstakes was held in 1845 to be a chose in action.[9] In 1869, and again in 1883, things in action were in the Bankruptcy Acts of those years included in the different kinds of property divisible among the creditors of a bankrupt, and the House of Lords decided, in *Colonial Bank* v. *Whinney*,[10] that shares

[1] *Howard* v. *Fanshawe*, [1895] 2 Ch. 581.
[2] See *ante*, p. 333.
[3] *Per* Cotton, L. J., in *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. at p. 275.
[4] *Priddy* v. *Rose* (1817), 3 Mer. 86; *Norcutt* v. *Dodd* (1841), Cr. & Ph. 100. The contrary had been held in *Gerrard* v. *Boden* (1628), Hetley, 80.
[5] *Wiltshire* v. *Rabbits* (1844), 14 Sim. 76.
[6] *Dundas* v. *Dutens*, 1 Ves. jun. at p. 198.
[7] *Wildman* v. *Wildman*, 9 Ves. at p. 176.
[8] *Humble* v. *Mitchell*, 11 A. & E. 205; and see *Ex parte Agra Bank* (1868), L. R. 3 Ch. at p. 558.
[9] *Jones* v. *Carter*, 8 Q. B. 134.
[10] (1886), 11 App. Cas. 426.

were things in action within the meaning of section 44 (3) of the Bankruptcy Act, 1883. "I think," said Lord Blackburn, "it was hardly disputed that, in modern times, lawyers have accurately or inaccurately used the phrase 'choses in action' as including all personal chattels that are not in possession."[1] And it has now been held that a claim to compensation in respect of lands injuriously affected in the lawful exercise of statutory powers is a chose in action, although no action would lie to recover such compensation.[2]

And even in dealing with matters which were originally "choses in action" at common law—such as debts and claims for damages—the phrase has acquired a new meaning. A debt is now regarded as property, as a kind of asset; and, when so regarded, it is now called a chose in action, whether the money be payable or not, whether an action would lie for it or not. In other words, there can now be a chose in action where there is as yet no right of action.

Thus, if A. owes B. money, but the time for payment has not yet arrived, this is a good debt of some value, although it is one which is not yet payable. It is, therefore, a chose in action although B. has not at present any right to sue for it.[3] As soon as the time for payment has passed, he will have both a chose in action and a right of action.

*Assignment of Choses in Action at Common Law.*

It was a clear rule of the common law that a chose in action could not be granted or transferred to a stranger, so as to enable the transferee to sue upon it. It has been said that this rule was made in order to prevent "maintenance, suppression of right, and stirring up of suits; and therefore nothing in action, entrie or re-entrie can be granted over; for so, under colour thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed, which the common law forbiddeth."[4] But this was a result of the rule rather than its cause. The rule was but the logical consequence of the strict view taken

[1] *Ib.* at p. 440.
[2] *Dawson* v. *G. N. and City Ry. Co.*, [1905] 1 K. B. 260.
[3] See *Brice* v. *Bannister* (1878), 3 Q. B. D. 569; *West* v. *Newing* (1900), 82 L. T. 260.
[4] Co. Litt. 214 a; and see *Lampet's Case* (1612), 10 Rep. 46 b, 48 a.

by civilians of the nature of a contract; they held that the obligation imposed by a contract could rest only on the original contracting parties, who alone were regarded as being *in vinculo juris*. The rule applied to specialties as well as to simple contracts. No one could become the creditor of another without his consent.

"There is no doubt as to the law that if one person is indebted to another he cannot become under an obligation to a third party without the agreement of all three."[1] "A bond is not assignable at common law so as to enable the assignee to sue upon it in his own name."[2]

This was the rule of the common law which has now been almost entirely superseded. But it still remains the law that any chose in action, which is not assignable under the law merchant, or in equity, or by statute at its original creation, cannot be made so by the express contract and intent of the parties. It is not competent for them to attach to their engagements qualities not recognised by law as inherent in them. Thus a parol contract for the payment of money cannot be endowed with a negotiable quality at the mere will of the parties to it; nor can a deed be rendered transferable and negotiable like a bill of exchange or an exchequer bill.[3]

To the rule which forbade the assignment of choses in action, certain exceptions existed at common law, and many others were made by the law merchant, by the rules of equity and by legislation. For instance, the Courts of law were not bold enough to tie up the property of the Crown, or to prevent it from being transferred, so that the transferee might sue for it in his own name.[4] Again, an assignment of a chose in action might occur at common law in the event of marriage, of bankruptcy, or of death. So, where a covenant runs with the land, the right to sue upon it passes from assignee to assignee of the term or reversion, though in this case the common law attempted to disguise the fact by creating a fictitious kind of privity, which it termed privity of estate.[5]

We must pause here to explain the meaning of the phrase "a covenant, which runs with the land." If land was demised by a lease under seal, the

[1] *Per* Bramwell, B., in *Noble* v. *National Discount Co.* (1860), 5 H. & N. at p. 228.
[2] *Per* Martin, B., in *Young* v. *Hughes* (1859), 4 H. & N. 84.
[3] See *Dixon* v. *Bovill* (1856), 3 Macq. H. L. Cas. 1; *Crouch* v. *Credit Foncier of England* (1873), L. R. 8 Q. B. 374; *London and County Banking Co.* v. *London and River Plate Bank* (1887), 20 Q. B. D. 232; (1888), 21 Q. B. D. 535.
[4] "Termes de la Ley" (ed. 1641), Chose in Action, p. 59.
[5] See *post*, p. 888.

lessor could always sell his estate subject to the lease, and the tenant could assign his interest in the term, unless this was expressly forbidden by the lease. At common law, though an estate was assignable, a contract was not ; hence it followed that the assignee was not bound by the covenants contained in the lease. To remedy this state of affairs, the statute of 32 Henry VIII. c. 34 was passed, which gave the assignee of the reversion the same rights against the tenant and his assigns as the landlord had, and also gave to the tenant and his assigns the same remedies against the reversioner and his assigns, as they would have had against the original landlord.[1] This statute was construed to refer only to covenants which related to the subject-matter of the demise. These are said to "run with the land." The rules on the subject are laid down in *Spencer's Case*.[2] All covenants implied by law run with the land, such as that implied from the words "yielding and paying" in a lease : so do those covenants which are implied under the Conveyancing Act, 1881.[3]

Where a landlord covenanted to supply the demised premises with water, it was held that the covenant ran with the land and with the reversion.[4] A covenant by a lessee of a beerhouse to conduct and manage the business in such proper and orderly manner as to afford no pretext whereby the licence might be, or be in danger of being, suspended, discontinued or forfeited, runs with the land.[5] But if the covenant, though concerning the land demised, be one relating to something not in being at the date of the covenant, it will not, as a rule, bind the assignee; such, for instance, as a covenant to pay a share of the expense of subsequently making a new road to lead to the demised premises.[6]

A covenant not to assign without the leave of the landlord runs with the land;[7] but not so an unqualified covenant not to assign ;[8] this is regarded as the personal engagement of the original tenant. On an assignment by a tenant privity of estate between him and the landlord ceases, yet privity of contract still exists between them, and consequently the original tenant still remains liable to the landlord on all express covenants. But if the assignee of a term part with his interest, he is liable only for breaches of covenants running with the land committed while he held it, since his liability arose from his connection with the land which has now ceased. But whilst the assignee is in possession of an interest in the land, he is bound, as regards the lessee, to pay rent and perform the covenants.

With these exceptions, then, no chose in action could at common law be assigned or granted over to another. Any attempt to assign such a chose in action was invalid; the

[1] Ss. 1, 2 ; see also 44 & 45 Vict. c. 41, ss. 10—12.
[2] (1583), 1 Smith, L. C., 11th ed., 55, 61, *n.*
[3] 44 & 45 Vict. c. 41, s. 7.
[4] *Jourdain* v. *Wilson* (1821), 4 B. & Ald. 266.
[5] *Fleetwood* v. *Hull* (1889), 23 Q. B. D. 35.
[6] See *Doughty* v. *Bowman* (1848), 11 Q. B. 444 ; *Minshull* v. *Oakes* (1858), 2 H. & N. 793.
[7] *Williams* v. *Earle* (1868), L. R. 3 Q. B. 739.
[8] *Philpot* v. *Hoare* (1741), 2 Atk. 219 ; *Bally* v. *Wells* (1769), 3 Wils. 25, 33.

assignee could not sue on the assignment in his own name; and if the debtor paid the assignee, he could be compelled to pay the debt over again to the assignor.[1] The law merchant, however, disregarded the rules of the common law and permitted negotiable instruments to be freely assigned; the acceptor or indorser of a bill of exchange was always liable to be sued by a stranger with whom he had never contracted. And scrip issued in this country by the agent of a foreign government, entitling the holder, on payment of the instalments, to receive from that agent definite bonds of the foreign government, has been held to be negotiable by international custom and to pass by delivery to a *bonâ fide* holder for value.[2] So, too, Parliament has from time to time rendered certain choses in action assignable.

Promissory notes, if not freely negotiable before, were rendered so by the statutes 3 & 4 Anne, c. 9, and 7 Anne, c. 25. The sheriff was allowed to assign a bail-bond to a purchaser, who could then sue both the principal and the bail thereunder in his own name (4 & 5 Anne, c. 16, s. 20). Replevin bonds (11 Geo. II. c. 19); mortgage bonds of a company (8 & 9 Vict. c. 17, s. 45); bills of lading, if indorsed (18 & 19 Vict. c. 111); East India bonds (51 Geo. III. c. 64, s. 4); mortgage debentures issued by land companies under the Mortgage Debenture Act, 1865 (28 & 29 Vict. c. 78); debts and things in action of companies (Companies Act, 1862, 25 & 26 Vict. c. 89); choses in action of bankrupts (32 & 33 Vict. c. 71, s. 22); and transferable debentures under the County Debentures Act, 1873 (36 & 37 Vict. c. 35), were subsequently made assignable. By 30 & 31 Vict. c. 144, policies of life assurance may be legally assigned, either by indorsement of the policy, or by a separate instrument in the form provided by the Act. And by 31 & 32 Vict. c. 86, policies of marine insurance may similarly be assigned by indorsement in statutory form. In all these cases, the assignee could sue at law in his own name.

In all other cases the common law remained unaltered till 1875. Thus an ordinary simple contract debt could not, before the Judicature Act, be legally assigned, nor could the benefit or burden of a covenant in a deed, apart from an interest in realty. The only way in which such a debt could

[1] *Davis* v. *Petrie*, [1906] 2 K. B. 786.

[2] *Goodwin* v. *Robarts* (1876), 1 App. Cas. 476; *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194; *Bechuanaland Exploration Co.* v. *London Trading Bank, Ltd.*, [1898] 2 Q. B. 658; *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144. But post-office orders have been held not to fall within the rule laid down in *Goodwin* v. *Robarts*: *Fine Art Society* v. *Union Bank* (1886), 17 Q. B. D. 705.

be transferred at common law was by a new contract, in which all three parties—assignor, assignee and debtor—took part. And this new contract required consideration to support it; the debtor had to be released by the assignor, and to consent expressly in consideration of such release to become liable to the assignee. This was in fact a novation, not an assignment.

### *In Equity.*

In equity, however, a different practice prevailed. The Court of Chancery from a very early period recognised as valid, and carried into effect, assignments of a chose in action and even of a mere naked possibility, provided they were made for valuable consideration.[1]

Thus a mere expectancy, such as that of an heir-at-law to the estate of an ancestor,[2] or the interest which a person may take under the will of another then living,[3] was always assignable in equity for valuable consideration, and when the expectancy fell into possession the assignment would be enforced, unless public policy or some other rule of equity forbade. The same rule prevailed, and still prevails, in equity in the case of non-existing property to be hereafter acquired, such as freight not yet earned,[4] future patent rights,[5] or machinery yet to be erected.[6] But the claim of such an assignee will always be postponed to the right of a *bonâ fide* purchaser, who secures the legal title,[7] and is subject also to the title of the assignor's trustee in bankruptcy, in case the bankruptcy occurs before the expectancy falls into possession.[8] No man can make a valid assignment of money which never accrues due to him, but only to his trustee in bankruptcy.

But equity could not wholly disregard the law in this matter. If the assignor had given a power of attorney authorising the assignee to sue for the debt in the name of the assignor, and that course was adopted, the judgment would bind the assignor, as it would stand in his name, and

[1] *Anon.* (1673), Freem. Chy. 145; *Squib* v. *Wyn* (1717), 1 P. Wms. 378.
[2] *Hobson* v. *Trevor* (1723), 2 P. Wms. 191.
[3] *Warmstrey* v. *Lady Tanfield* (1629), 1 Ch. R. 29; *Musprat* v. *Gordon* (1792), 1 Anst. 34; *Bennett* v. *Cooper* (1846), 9 Beav. 252.
[4] *Lindsay* v. *Gibbs* (1856), 22 Beav. 522.
[5] *Printing, &c., Co.* v. *Sampson* (1875), L. R. 19 Eq. 462.
[6] *Holroyd* v. *Marshall* (1862), 10 H. L. Cas. 191.
[7] *Joseph* v. *Lyons* (1884), 15 Q. B. D. 280; *Hallas* v. *Robinson* (1885), 15 Q. B. D. 288.
[8] *Ex parte Hall* (1879), 10 Ch. D. 615; *Ex parte Nichols* (1883), 22 Ch. D. 782; *Wilmot* v. *Alton*, [1896] 2 Q. B. 254; [1897] 1 Q. B. 17; but see *Ex parte Rawlings* (1888), 22 Q. B. D. 193.

be a good discharge to the debtor at law as well as in equity. But if the assignee sued in his own name in equity, the decree in his favour was no bar to an action by the assignor at common law. If the chose in action was of a purely equitable nature, this would not matter, as the assignor could never sue for it at law. But in all other cases the equity judges very properly required the assignee to bring the assignor before the Court, so that he should be bound by their decree. If he would not consent to join as a co-plaintiff with the assignee, he was made a defendant; but he had to be a party to the proceedings on one side or other of the record, otherwise the unfortunate debtor might be compelled to pay the debt over again.

*Under the Judicature Act.*

There being this conflict between law and equity, a provision curiously limited was inserted in the Judicature Act of 1873. It did not wholly supersede the common law, nor establish the equitable procedure, but created a new practice of its own. It runs as follows:—

S. 25, sub-s. 6.—"Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been, effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee, if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor; provided always, that if the debtor, trustee or other person liable in respect of such debt or chose in action, shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice, under and in conformity with the provisions of the Acts for the relief of trustees."[1]

[1] As to the procedure under the concluding proviso of this section, which extends the power to interplead, see *In re New Hamburg Ry. Co.*, [1875] W. N. 239; *In re Sutton's Trusts* (1879), 12 Ch. D. 175; *Reading* v. *School Board for London* (1886), 16 Q. B. D. 686; and Order LVII.

This section, it will be observed, affects procedure rather than the substantive law; "it does not give new rights, but only affords a new mode of enforcing old rights."[1] It makes nothing an assignment which was not an assignment before.[2] On the other hand, many an assignment which was valid in equity before the Judicature Act is not within the scope of this section, and is therefore still invalid in law, and can only be enforced in the manner usual in Courts of equity before the Act. In other words, there must be good consideration for the assignment, and the assignor must be joined, either as a plaintiff or a defendant.[3] And in cases which do fall within the section, all former equities remain; the assignee has the benefit of a new procedure at law; but none of the rights of the debtor or of the assignor are restricted or destroyed.[4]

The distinctions between assignments within the section and those outside it should be carefully noted, so that the plaintiff may know which procedure to adopt:—

(1) The section deals only with absolute assignments "not purporting to be by way of charge only."

(2) To be within the statute, the assignment must be of some "debt or other legal chose in action."

(3) It was essential to the validity of an equitable assignment before the Act (and it still remains essential in all cases not within this section) that the assignment should be for valuable consideration; without such consideration there was no ground for the interference of a Court of equity. But in the case of an assignment, otherwise valid under this section, it is not necessary that there should be any consideration for the assignment.[5]

(4) To bring the case within the section, the assignment must be in writing, and express notice thereof must be given in writing to the debtor or holder of the fund. The assignee must prove both, or he will establish no cause of action.[6]

[1] *Per cur.* in *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. at p. 515.
[2] *Schroeder* v. *The Central Bank* (1876), 34 L. T. 735.
[3] See *Turquand* v. *Fearon* (1879), 4 Q. B. D. 280.
[4] *Hudson* v. *Fernyhough* (1889), 61 L. T. 722.
[5] *Lee* v. *Magrath* (1882), 10 L. R. Ir. 45, 313; *Harding* v. *Harding* (1886), 17 Q. B. D. 442.
[6] *Read* v. *Brown* (1888), 22 Q. B. D. 128.

In equity (apart from the Statute of Frauds[1]), a verbal assignment, if clearly proved, was formerly and still is sufficient, provided the assignor be made a party to the action and the assignment be for valuable consideration.[2] So also a verbal notice to the debtor is quite sufficient to make the assignment good in equity.[3] But to be within the section both assignment and the notice of it must be in writing.

(5) Again, an assignment under the Judicature Act resembles an equitable assignment, and differs from the transfer of a negotiable instrument under the law merchant in this—that the assignee takes subject to all sets-off and equities which would avail against the assignor, not merely at the date of the assignment, but until notice is given.[4]

*What is an Absolute Assignment within the Section.*

The assignment must be absolute; it must not purport to be "by way of charge only." Whether it is an absolute assignment or not depends upon the true construction of the instrument. "In every case of this kind, all the terms of the instrument must be considered; and, whatever may be the phraseology adopted in some particular part of it, if on consideration of the whole instrument it is clear that the intention was to give a charge only, then the action must be in the name of the assignor; while, on the other hand, if it is clear from the instrument as a whole that the intention was to pass all the rights of the assignor in the debt or chose in action to the assignee, then the case will come within section 25, and the action must be brought in the name of the assignee."[5] It will be held that the instrument creates a charge only, though general words be used, if, when the whole is looked at, it appears that what was intended was only to assign so much of the debt or chose in action as would provide security for a lesser debt due from the

[1] As to which see *Ex parte Hall* (1879), 10 Ch. D. 615.
[2] *Field* v. *Megaw* (1869), L. R. 4 C. P. 660.
[3] *Ex parte Agra Bank* (1868), L. R. 3 Ch. 555.
[4] *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511.
[5] *Per* Mathew, L. J., in *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. at p. 193.

assignor to the assignee.[1] "By a charge the title is not transferred, but the person creating the charge merely says that out of a particular fund he will discharge a particular debt."[2] But a document will be held an absolute assignment whenever it is clear from the terms of it that the intention of the parties was to transfer to the assignee complete control of the fund, and to put him for all purposes in the position of the assignor with regard to it.[3]

It is submitted that the following are the tests which determine whether an assignment is or is not an "absolute assignment" within the section:—

1. Has the assignor divested himself of all right to sue for the debt or other chose in action and transferred that right to the assignee? If the assignor can still sue the debtor or holder of the fund, the assignment is not absolute. It would be manifestly unfair to leave the debtor exposed to attack from two quarters.

2. Does the assignment entitle the assignee to receive the money, and will his receipt be a good discharge for it?

3. Will the assignment when perfected by notice prevent the debtor or holder of the fund from paying anyone but the assignee; and can the debtor safely pay the assignee without inquiring into the state of the accounts between the assignor and the assignee?[4]

4. Is the debtor or holder of the fund bound to pay the assignee the whole debt or so much of it as has been definitely assigned? If he has a right, notwithstanding the assignment, to have accounts taken between himself and the assignor before making any payment to the assignee, the assignment is by way of charge only and not an absolute assignment within the section.[5]

No special form of words is necessary; any words will suffice which show a clear intention to transfer a chose in

[1] *Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. 613; *Jones* v. *Humphreys*, [1902] 1 K. B. 10.

[2] *Per* Day, J., in *Burlinson* v. *Hall* (1884), 12 Q. B. D. at p. 350.

[3] *Comfort* v. *Betts*, [1891] 1 Q. B. 737; *In re Hoffe's Estate Act* (1900), 82 L. T. 556. But see *In re Sheward*, [1893] 3 Ch. 502.

[4] See *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. at p. 198.

[5] See the judgment of Vaughan Williams, L. J., in *Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. at p. 617.

action, or which distinctly appropriate a specific portion of a specified fund, to or to the use of the assignee.[1] The language must be sufficiently imperative to make it the duty of the debtor or holder to pay the money, when the time for payment arrives, to the assignee and not to the assignor. But a mere suggestion to the debtor or holder, leaving him free to exercise his discretion in whatever way he thinks best, will not be sufficient.[2]

It is not enough to mention the existence of a particular fund; there must be a clear intention to deal with it so as to benefit the assignee. Thus, merely informing a creditor that he will be paid as soon as a certain fund comes to hand, is no assignment on that fund.[3] A promise to pay money when the person promising shall be paid a debt due to him from a third person, is no assignment of that debt.[4] Drawing a bill of exchange on a merchant, or a cheque payable at a particular bank, is no assignment of any portion of the drawer's balance in the hands of that merchant or at that bank.[5] Moreover, the debt or fund assigned must be clearly indicated; so that there will be no difficulty hereafter in identifying the property, an interest in which is transferred.[6] Choses in action, which are not yet vested in the assignor, can be assigned as completely as any other debt if words sufficiently clear be used; the document must purport by its own force to convey an interest in them to the assignee, leaving nothing to be done by either assignor or assignee to complete the title of the latter when they come into existence.[7]

Again, to bring the case within the section the assignment must be "in writing under the hand of the assignor," and express notice of it in writing must be "given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action." That the writing is under seal is immaterial.[8] The usual course is for the assignment to be addressed by the

[1] *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763, 776; *Gorringe* v. *Irwell Co.* (1886), 34 Ch. D. 128.

[2] *Watson* v. *Duke of Wellington* (1830), 1 Russ. & M. 602. Documents commencing, "I hereby authorise you to pay," etc., were held sufficient in *Lett* v. *Morris* (1831), 4 Sim. 607; *Diplock* v. *Hammond* (1854), 5 De G. M. & G. 320; and *M'Gowan* v. *Smith* (1857), 26 L. J. Ch. 8.

[3] *Malcolm* v. *Scott* (1843), 3 Hare, 39; *Jones* v. *Starkey* (1852), 16 Jur. 510.

[4] *Field* v. *Megaw* (1869), L. R. 4 C. P. 660.

[5] *Schroeder* v. *The Central Bank* (1876), 34 L. T. 735; *Brown, Shipley & Co.* v. *Kough* (1885), 29 Ch. D. 848.

[6] *Percival* v. *Dunn* (1885), 29 Ch. D. 128.

[7] *In re Irving* (1877), 7 Ch. D. 419; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523, overruling *Belding* v. *Read* (1865), 3 H. & C. 955; and *In re D'Epineuil* (1882), 20 Ch. D. 758; but see *International Fibre Syndicate* v. *Dawson* (1901), 84 L. T. 803.

[8] *Marchant* v. *Morton, Down & Co.*, [1901] 2 K. B. 829.

assignor to the assignee, and to be retained by the assignee, who addresses a separate document to the holder of the fund, giving him notice of the assignment. But this is not necessary. If the assignor thinks fit to part with the document constituting his title, and to forward it to the debtor, so as to make the one document both assignment and notice of assignment, this will be equally efficacious. Or again, the assignor may address the document which constitutes the assignment to the holder of the fund and forward it to him, directing him to pay the money in accordance therewith; and this will be sufficient, both in equity and under section 25, sub-section 6, of the Judicature Act, 1873, if the document subsequently be shown or otherwise made known to the assignee.[1] But in such a case care must be taken not to word the document so as to make it an informal bill of exchange, which, if not properly stamped, would be wholly inadmissible in evidence.[2]

If the document relied on as an assignment be addressed by the assignor neither to his creditor nor to his debtor or the holder of the fund, but only to some agent of his own, such as his solicitor, rent collector, bailiff or steward, then this is not an assignment, so long, at all events, as it remains unknown to the assignee. Till then, it is like a power of attorney, or the appointment of a receiver.[3] Such an "order to pay" is a mere mandate from a principal to his own agent, bidding him pay a debt out of a certain fund; and this gives the creditor no specific charge on that fund. Until it is communicated to the creditor, and assented to by him, it may be revoked, but not afterwards. And the bankruptcy or death of the principal operates as such a revocation. But after such communication, the money is "fixed" in the agent's hands, and the order cannot be countermanded.[4]

It is not necessary that there should be any consideration for an absolute assignment under the Act; it is not necessary

[1] *Wigan* v. *Law Life Assurance Association*, [1909] 1 Ch. 291.
[2] *Ex parte Shellard* (1873), L. R. 17 Eq. 109.
[3] *Rodick* v. *Gandell* (1852), 1 De G. M. & G. 763; *Bell* v. *L. & N. W. Ry. Co.* (1852), 15 Beav. 548.
[4] *Fitzgerald* v. *Stewart* (1831), 2 Russ. & M. 457; *Palmer* v. *Culverwell* (1902), 85 L. T. 758.

that the assignee should take any beneficial interest for himself; the motive for which the assignment is made is immaterial.[1] Hence an assignment of a debt or legal chose in action may be absolute within the Judicature Act, although a trust is thereby created in respect of the proceeds of such debt or chose in action in favour of the assignor.[2] So a deed, by which debts are assigned to the plaintiff upon trust that he should receive them and out of them pay himself a sum due to him from the assignor and then pay the surplus to the assignor, is an absolute assignment within the section.[3] It is now clear law that a mortgage, made in the ordinary form, is an absolute assignment within the section, although it contains a proviso for redemption and reconveyance upon repayment; for full dominion over the property is transferred to the mortgagee immediately upon the execution of the deed.[4]

*What may be assigned.*

The section applies only to an assignment of "any debt or other legal chose in action." The word "legal" was probably inserted because equitable choses in action were already assignable, but it would have been better omitted; as now since the fusion of law and equity it is somewhat difficult to define "a legal chose in action." The phrase clearly is not restricted to those choses in action which could be assigned at law before the Act was passed. It must include all choses in action which the assignor, in the absence of any assignment, could now recover by an action in the King's Bench Division. But legacies, trust funds and claims against the estate of a deceased person, which is being administered in the Chancery Division, remain apparently equitable choses in action, and would seem, therefore, not to be within the section.

[1] *Wiesener* v. *Rackow* (1897), 76 L. T. 448; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364.

[2] *Comfort* v. *Betts*, [1891] 1 Q. B. 737; *In re Bell*, [1896] 1 Ch. 1; and see *Palmer* v. *Culverwell* (1902), 85 L. T. 758.

[3] *Burlinson* v. *Hall* (1884), 12 Q. B. D. 347; *Ibberson* v. *Neck* (1886), 2 Times L. R. 427.

[4] *Tancred* v. *Delagoa Bay Ry. Co.* (1889), 23 Q. B. D. 239, overruling *National Provincial Bank* v. *Harle* (1881), 6 Q. B. D. 626; and see *Durham Bros.* v. *Robertson*, [1898] 1 Q. B. at p. 772; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. at p. 195.

In *Cronk* v. *M'Manus*[1] Denman, J., held that "a mere equity of redemption" was not "a legal chose in action." A promise by a lender to make further advances to the borrower is not a legal chose in action.[2] But in *Dawson* v. *G. N. & City Ry. Co.*[3] the Court of Appeal decided that a claim to compensation in respect of lands injuriously affected in the lawful exercise of statutory powers was a legal chose in action, although no action would lie to recover such compensation.

The Court of Appeal in *May* v. *Lane*[4] expressed the opinion (*obiter*) that the right to bring an action for unliquidated damages, whether in tort or contract, was not "a legal chose in action" within this section and therefore not assignable. In *King* v. *Victoria Insurance Co., Ltd.*,[5] however, the Supreme Court of Queensland held that identical words in their Colonial Act included "all rights, the assignment of which a Court of law or equity would before the Act have considered lawful," and the Judicial Committee of the Privy Council did "not express any dissent" from this view. In *Dawson* v. *G. N. & City Ry. Co.*,[6] in the Court below Wright, J., after referring to *May* v. *Lane*, said: "There are no doubt some expressions in the judgments of the Lords Justices in the case of the *Colonial Bank* v. *Whinney*,[7] which seem to approve a statement in Williams on Personal Property to the effect that a right to damages for a tort may be a legal chose in action; but the decision of the Court of Appeal in that case was reversed in the House of Lords,[8] and it is difficult to suppose that it was intended by section 25 of the Judicature Act to make all rights as to damages—for example, for libel or assault—assignable under that section." These remarks were also *obiter*, and the judges of the Court of Appeal, who reversed his decision, were silent on this point. It is clear, however, from the extracts cited[9] from "Termes de la Ley" and Brook's Abridgement that a right of action for unliquidated damages in an action either of contract or of tort was a chose in action at common law; and there is nothing in the Judicature Act to alter this: it merely makes "any legal chose in action" assignable. Of course, if the assignment of a legal chose in action be tainted with maintenance, it is invalid.[10] The House of Lords has decided that a claim for unliquidated damages for a breach of contract is a thing in action, which passes on bankruptcy to the trustee and is assignable by him to a third person.[11]

The duty of performing a contract cannot be assigned without the consent of the other party, whenever its performance involves personal skill, knowledge or supervision which is not capable of being rendered by every-

[1] (1892), 8 Times L. R. 449.
[2] *Western Wagon Co.* v. *West*, [1892] 1 Ch. 271; *May* v. *Lane* (1894), 64 L. J. Q. B. 236.
[3] [1905] 1 K. B. 260.
[4] (1894), 64 L. J. Q. B. at pp. 237, 238.
[5] [1896] A. C. 250, 254, 256.
[6] [1904] 1 K. B. at p. 281.
[7] (1885), 30 Ch. D. 261.
[8] (1886), 11 App. Cas. 426.
[9] *Ante*, p. 759.
[10] See *post*, p. 775.
[11] *Ogdens* v. *Weinberg* (1906), 95 L. T. 567.

one, *e.g.* a contract to publish a book.[1] Thus, where the defendant agreed to supply K., a cake manufacturer, for one year with all the eggs which he would require for his business, and K. during the year transferred his business to a company, it was held that the contract was with K. personally and that the defendant was not bound to supply any more eggs either to K. or to the new company.[2] But it has been held in Scotland that a company, which had entered into a contract to pave certain streets and maintain the surface in good condition for a term of years, was entitled to assign the execution of the contract as in such contract there was no *delectus personæ*.[3] And an author can assign the copyright of a book which is not yet finished, and such an assignment may be in the form of an agreement to assign.[4]

The presence in a contract of an express condition, that it "shall not be assignable in any case whatever," will not prevent an assignment of the beneficial interest thereunder.[5] The question what effect must be given to an express promise by an assignor that he will not create any prior charge on the property assigned, is discussed in *Brunton* v. *Electrical Engineering Corporation*, [1892] 1 Ch. 434; *English and Scottish Co., Ltd.* v. *Brunton*, [1892] 2 Q. B. 700; and *Robson* v. *Smith*, [1895] 2 Ch. 118. A provision in a policy preventing assignment, except on conditions, is good, and prevents the policy being assigned except in conformity with those conditions.[6]

A debt not yet due or payable is clearly assignable, if apt words be used, not merely in equity, but also at law under the Judicature Act, *e.g.*, rent not yet due,[7] or retention-money not yet payable under a building contract.[8]

But the assignment of an undefined portion of a future debt is not a good assignment within the Judicature Act, and it is now very doubtful whether a definite portion of a future unascertained, but ascertainable, debt can be assigned under the statute.[9] "I think there is no doubt that an absolute assignment of future debts may be a good assign-

[1] *Griffith* v. *Tower Publishing Co.*, [1897] 1 Ch. 21; *Dr. Jaeger's Sanitary Woollen Co.* v. *Walker* (1897), 77 L. T. 180; *International Fibre Syndicate* v. *Dawson* (1901), 84 L. T. 803.

[2] *Kemp and others* v. *Baerselman*, [1906] 2 K. B. 604, distinguishing *Tolhurst* v. *Cement Manufacturers, Ltd.*, [1903] A. C. 414.

[3] *Asphaltic Limestone Concrete Co.* v. *Glasgow Corporation*, [1907] S. C. 463.

[4] *Ward, Lock & Co.* v. *Long*, [1906] 2 Ch. 550. As to an assignment of musical copyright, see *In re Jude's Musical Compositions*, *ib.*, 595.

[5] *In re Turcan* (1888), 40 Ch. D. 5; *In re Griffin*, [1899] 1 Ch. 408.

[6] *Laurie* v. *West Hartlepool T.I.A. and David* (1899), 4 Com. Cas. 322; and see *Stokell* v. *Heywood*, [1897] 1 Ch. 459.

[7] *Southwell* v. *Scotter* (1880), 49 L. J. Q. B. 356; *Knill* v. *Prowse* (1884), 33 W. R. 163.

[8] See *ante*, p. 739; *Brice* v. *Bannister* (1878), 3 Q. B. D. 569; *Buck* v. *Robson* (1878), 3 Q. B. D. 686; *Ex parte Moss* (1884), 14 Q. B. D. 310; *Drew & Co.* v. *Josolyne* (1887), 18 Q. B. D. 590.

[9] So long as the decision of Lord Coleridge, C. J., in *Brice* v. *Bannister* (1878), 3 Q. B. D. 569, remained unquestioned, it appeared to be clear that a portion of any debt could be assigned, and this decision was followed in *Ex parte Moss* (1884), 14

ment for the purposes of the section; and I also think that an absolute assignment of a definite sum out of a future debt may possibly be within the section. But I think that an assignment of an undefined portion of future debts will not come within it."[1]

An assignment of a man's property, present and future, may be invalidated as an act of bankruptcy. But an assignment which affects one species of property only is valid.[2] An assignment after bankruptcy petition, but before appointment of a receiver, is protected by section 49 of the Bankruptcy Act, 1883.[3] Again, public policy forbids that effect should be given to assignments of pensions and salaries of public officers, payable to them for the purpose of keeping up the dignity of their office, or to assure a due discharge of their official duties.[4] Thus the pay of an officer in the army,[5] and the salary of a judge given to him to support the dignity of his office, have been held not assignable; but, *semble*, such assignments are valid when the office is a sinecure or the duties have ceased.[6] Again, it is expressly provided that old age pensions cannot be assigned under any circumstances.[7]

On similar principles of public policy the Court will not give effect to assignments which partake of the nature of champerty, or maintenance, or buying of pretended titles.[8] A sale and assignment by a client to his solicitor *pendente lite*, of the subject-matter of the action, is invalid, provided the relationship of solicitor and client exists at the date of the assignment.[9] A mortgage of such subject-matter *pendente*

Q. B. D. 310; *Drew & Co.* v. *Josolyne* (1887), 18 Q. B. D. 590; and in *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208. But doubt has recently been cast upon the correctness of these decisions in *Durham Bros.* v. *Robertson*, [1898] 1 Q. B. 765, 774; *Jones* v. *Humphreys*, [1902] 1 K. B. 10, 13, 14; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190, 195; and in *Torkington* v. *Magee*, *ib.* 427, 434, though there is as yet no actual decision on the point; a part of a judgment debt, however, cannot be effectually assigned: *Forster* v. *Baker* (1910), 102 L. T. 522.

[1] *Per* Lord Alverstone, C. J., in *Jones* v. *Humphreys*, [1902] 1 K. B. at p. 13.

[2] See the remarks of Lord Watson, in *Tailby* v. *Official Receiver* (1888), 13 App. Cas. at p. 535.

[3] 46 & 47 Vict. c. 52; and see *In re Dunkley & Son*, [1905] 2 K. B. 683.

[4] *Jones* v. *Coventry*, [1909] 2 K. B. 1029.

[5] *Stone* v. *Lidderdale* (1795), 2 Anst. 533.

[6] *Arbuthnot* v. *Norton* (1846), 5 Moo. P. C. C. 219; *Grenfell* v. *The Dean and Canons of Windsor* (1840), 2 Beav. 544, 550.

[7] 8 Edw. VII. c. 40, s. 6.

[8] *Stevens* v. *Bagwell* (1808), 15 Ves. 139; *Fitzroy* v. *Cave*, [1905] 2 K. B. 364.

[9] *Simpson* v. *Lamb* (1857), 7 E. & B. 84; *Davis* v. *Freethy* (1890), 24 Q. B. D. 519; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437.

*lite* is not necessarily invalid; but it may be tainted with champerty.[1] Since choses in action are now attachable,[2] an assignment of them may be void under 13 Eliz. c. 5 as tending to defeat, hinder or delay creditors. If the effect, not necessarily the object, of the assignment is to defeat, hinder or delay one particular creditor only, the assignment will be void under the statute.[3]

Lastly, an assignment may in some cases be invalid, as an unregistered bill of sale.[4]

*Notice.*

The statute requires that notice in writing be given to the "debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action." The notice may be given by either the assignor or assignee, or by the executors of the assignee after his death, who will then be entitled to sue for the debt in their own names.[5] The method usually adopted is for the assignee to retain the assignment, and address a separate document to the debtor or holder of the fund giving him notice of the assignment. Sometimes, however, the assignor forwards to the debtor the assignment itself, thus making the one document both assignment and notice; this will be sufficient, if done with the knowledge and consent of the assignee.[6] The statute does not fix any limit of time within which notice must be given. Hence a notice in writing, given by the assignee after the death of the assignor, will be sufficient.[7]

No special form of words is required. "The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person.

[1] *James* v. *Kerr* (1888), 40 Ch. D. 449.
[2] Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 60 *et seq.*
[3] *Edmunds* v. *Edmunds*, [1904] P. 362.
[4] *Church* v. *Sage* (1892), 67 L. T. 800; *London and Yorkshire Bank* v. *White* (1895), 11 Times L. R. 570.
[5] *Bateman* v. *Hunt*, [1904] 2 K. B. 530.
[6] *Brice* v. *Bannister* (1878), 3 Q. B. D. 569; *Buck* v. *Robson* (1878), 3 Q. B. D. 686; *Harding* v. *Harding and another* (1886), 17 Q. B. D. 442; *Palmer* v. *Culverwell* (1902), 85 L. T. 758.
[7] *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. 511.

If the debtor ignores such a notice, he does so at his peril."[1] But the notice must state the date of the assignment correctly, otherwise it will be invalid.[2]

An assignment otherwise complete is binding as between assignor and assignee, although no notice has been given to the debtor or holder of the fund. And all persons claiming through or under the assignor will be equally bound by such an assignment, such as a judgment creditor of the assignor[3] or a creditor who has obtained a garnishee order even without notice of the assignment.[4] Still there are many reasons why an assignee should never omit or delay to give notice of the assignment to the debtor or holder of the fund :—

1. He cannot sue the debtor or holder till such notice has been given ; if he desires to sue in his own name without making the assignor either a co-plaintiff or a defendant, he must give notice in writing.

2. If such notice be not given, the debtor or holder may pay the money to the assignor ; and such payment before notice would be an answer to any proceeding by the assignee, though the assignor can be compelled to pay over to the assignee the money which he has so received.[5] But as soon as notice of the assignment is given to the debtor or holder of the fund he can no longer make any payment to the assignor.[6]

3. The assignee takes subject to all equities which bind the assignor at the date of the notice : hence "the effect of not giving it is to let in all equities which may exist or be created prior thereto."[7]

4. Debts due or growing due to a bankrupt in the course of his business are "goods and chattels" within the reputed ownership clause of the Bankruptcy Act, 1883.[8] Notice of

[1] *Per* Lord Macnaghten in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. at p. 462.
[2] *Stanley* v. *English Fibres Industries* (1899), 68 L. J. Q. B. 839.
[3] *Beavan* v. *Lord Oxford* (1855), 6 De G. M. & G. 507.
[4] *Pickering* v. *Ilfracombe Ry. Co.* (1868), L. R. 3 C. P. 235 ; *Scott* v. *Lord Hastings* (1858), 4 K. & J. 633 ; *Badeley* v. *Consolidated Bank* (1888), 38 Ch. D. 238.
[5] *In re Patrick*, [1891] 1 Ch. 82.
[6] *Liquidation Estates Purchase Co.* v. *Willoughby*, [1898] A. C. 321.
[7] *Per cur.* in *Walker* v. *Bradford Old Bank* (1884), 12 Q. B. D. at p. 517. The law is otherwise in New York : *Kelly* v. *Selwyn*, [1905] 2 Ch. 117.
[8] 46 & 47 Vict. c. 52, s. 44 (iii.).

assignment is therefore necessary to take such a debt out of the apparent possession of the bankrupt; and such notice must be given prior to the date of the petition. No other choses in action, however, are now within the clause,[1] and the bankruptcy rules as to reputed ownership are not imported into the winding-up of companies.[2]

5. The assignee of a chose in action is expected in equity to do all he can to complete his title, if only for the protection of innocent third persons. If he neglects to take any step obviously in his power (such as giving notice), and thereby enables the assignor to make a subsequent assignment of the chose in action to a purchaser for value, who takes without notice, his claim will be postponed to that of the subsequent assignee. So if there be more than one assignment of the same chose in action, the assignee who first gives notice to the holder of the fund will obtain priority.[3] There is one exception: equitable charges on shares in registered companies have priority in order of date, irrespective of notice.[4]

For these reasons it is always prudent for the assignee, so far as the nature of the property admits, to put his mark on it, to show that it belongs to him and no longer to his assignor. Thus, if a trust fund be assigned, notice should be given to the trustee; if a debt, to the debtor; if a policy of assurance, to the office. Where stock held in trust is assigned, a *distringas* should be obtained. Where the chose in action is a fund in Court, the assignee should obtain a stop-order, otherwise he will be postponed to a subsequent assignee who obtains one.[5] But if notice was given to the trustee while he held the fund, there is no necessity for the assignee to obtain a stop-order, on the fund being subsequently paid into Court; his title was completed on his giving the notice to the trustee.[6] Where notice of an assignment of an equitable interest has been given at or soon after the date of the assignment to all the then existing trustees, the assignee is under no obligation to give any further notice, and is consequently entitled to priority over a subsequent assignee who has taken his assignment after the death or retirement of all those trustees and given notice of it to the new trustees.[7] There is apparently only one case in which a debtor need pay no attention to a notice of assignment, and that

[1] See *Colonial Bank* v. *Whinney* (1886), 11 App. Cas. 426.
[2] *Gorringe* v. *Irwell* (1886), 34 Ch. D. 128.
[3] *Johnstone* v. *Cox* (1880), 16 Ch. D. 571; *Kelly* v. *Selwyn*, [1905] 2 Ch. 117.
[4] *Société Générale de Paris* v. *Walker* (1885), 11 App. Cas. 20.
[5] *Mutual Life Assurance Society* v. *Langley* (1886), 32 Ch. D. 460; *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26.
[6] *Livesey* v. *Harding* (1856), 23 Beav. 141; *In re Holmes* (1885), 29 Ch. D. 786.
[7] *In re Wasdale*, [1899] 1 Ch. 163.

is where he has already given to his creditor a negotiable instrument in payment of the debt.[1]

*Rights of the Parties after an Assignment.*

If the assignment be given under seal or for valuable consideration, it is binding at once on the assignor, and cannot be revoked by him;[2] it binds also the assignor's trustee in bankruptcy and any execution creditor of his.[3] The assignment is completed as soon as the writing is posted, although the assignor become bankrupt before it is received.[4] Then, as soon as notice of the assignment is given to the debtor or the holder of the fund, it binds him too; it "fixes the money in his hand;" he can no longer pay the debt to the assignor, or hand over the fund to him, without first satisfying the assignee. If there was no consideration for the assignment, and it was not under seal, it can still be revoked;[5] but till it is revoked, it is valid and binding on the debtor or holder of the fund; any payment made by him in compliance with it is a good payment as against the assignor, and the receipt of the assignee is a discharge for the full amount assigned. And it will be idle for the assignor subsequently to repudiate the assignment, or to attempt after payment to countermand it. There is no need of any express acceptance of the assignment by the holder of the fund; he need not attorn to the assignee or enter into any contract to hold the fund for him.[6] For it is unnecessary for a man to promise expressly to do what he is bound to do;[7] and the holder must pay the money over to the assignee, even though the assignee refuses to indemnify him. If he pays the assignor, he can be compelled to pay the assignee over again.

The assignee of a chose in action, not transferable at common law, always took in equity subject to any defences which the debtor or holder would have had against the

[1] *Bence* v. *Shearman*, [1898] 2 Ch. 582.
[2] *Fortescue* v. *Barnett* (1834), 3 Myl. & K. 36.
[3] *Gorringe* v. *Irwell* (1886), 34 Ch. D. 128.
[4] *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208.
[5] *Wigan* v. *Law Life Assurance Association*, [1909] 1 Ch. 291.
[6] *Yeates* v. *Groves* (1791), 1 Ves. Jun. 280; *Burn* v. *Carvalho* (1839), 4 Myl. & Cr. 690, 703; *Bell* v. *L. & N. W. Ry. Co.* (1852), 15 Beav. 548.
[7] *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. 454.

assignor; and by the express words of the statute a similar liability attaches in the case of an assignment under the Judicature Act. The assignee takes subject to the state of accounts between the assignor and the debtor.

Thus, if a bond be void as against the assignor, it is void when in the hands of an assignee.[1] So a contract of sale which was obtained by misrepresentation, and which was therefore voidable as between the purchaser and the assignor, will be equally voidable as between the purchaser and the assignee; and the purchaser can recover from the assignee any moneys which he paid to the assignee before he elected to avoid the contract.[2] If a release for the debt be given by the assignor to the debtor after assignment, but before any notice of assignment has been given, the assignee cannot recover.[3] The assignee of a legacy or of a share in a residuary personalty, although for value and without notice, takes subject to the testator's debts.[4] So, if the debt be payable only on a certain condition, the condition binds the assignee.[5] The debtor or holder of the fund, if sued by the assignee, may set off or counterclaim against him any matter which he could have set off or counterclaimed against the assignor.[6]

This rule, that "the assignee of a chose in action takes subject to all rights of set-off and other defences which were available against the assignor," is subject to this limitation, "that after notice of an assignment of a chose in action, the debtor cannot, by payment or otherwise, do anything to take away or diminish the rights of the assignee as they stood at the time of the notice."[7] "It would be quite unreasonable that the assignee, who has given notice of the assignment, should be held affected by transactions taking place behind his back with the assignor."[8] But this will not prevent the debtor from availing himself of any set-off which arises, without any fresh act on his part, even after notice of assignment given, out of the same contract or transaction as gave rise to the debt assigned. He is entitled to have all accounts under that one contract taken together once for all, whether

[1] *Turton* v. *Benson* (1718), 1 P. Wms. 496.
[2] *Fleming* v. *Loe*, [1901] 2 Ch. 594.
[3] *Stocks* v. *Dobson* (1853), 4 De G. M. & G. 11.
[4] *Hooper* v. *Smart* (1875), 1 Ch. D. 90.
[5] *Tooth* v. *Hallett* (1869), L. R. 4 Ch. 242; *Drew & Co.* v. *Josolyne* (1887), 18 Q. B. D. 590.
[6] *Rolt* v. *White* (1862), 3 De G. J. & S. 360; *Young* v. *Kitchin* (1878), 3 Ex. D. 127.
[7] *Per* James, L. J., in *Roxburghe* v. *Cox* (1881), 17 Ch. D. at p. 526; and see *In re Milan Tramways* (1882), 22 Ch. D. 122; (1884), 25 Ch. D. 587.
[8] *Per* Lord Herschell in *Liquidation Estates Purchase Co.* v. *Willoughby*, [1898] A. C. at p. 331; and see *In re Bristow*, [1906] 2 Ir. R. 215.

there has been an assignment or not;[1] and if he can show that, when such accounts are properly taken, there will be no balance in favour of the assignor, it would be inequitable to compel him to make any payment to the assignee. The law on this point may be thus stated :—

1. Any set-off which the debtor or holder of the fund had against the assignor at the moment he received notice of the assignment is good against the assignee, whether it arises out of the same contract or any other.[2]

2. The defendant may also avail himself of any set-off or counterclaim which accrues to him after notice, if it arises out of the same contract or transaction as that on which he is sued.[3]

3. But the defendant cannot raise against the assignee any set-off or counterclaim which arises after notice out of an independent contract, whether made before or after notice of assignment.[4]

4. The defendant can only use such set-off or counterclaim for his own protection; he cannot recover any money from the assignee. If the amount of the set-off or counterclaim exceeds the amount of the debt assigned, the assignee can recover nothing: he must sue the assignor for the balance.[5]

*Equitable Assignments since the Judicature Act.*

A document, which is not an absolute assignment within section 25 (6) of the Judicature Act, may yet be a valid equitable assignment under the old rules that existed in Chancery before 1875; for the former equity is not destroyed by the modern statute; they remain side by side distinct and separate things. "It is plain that every equitable assignment, in the wide sense of the term as used in equity, is not

[1] *Bergmann* v. *Macmillan* (1881), 17 Ch. D. 423.
[2] *Biggerstaff* v. *Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93.
[3] *Government of Newfoundland* v. *Newfoundland Ry. Co.* (1888), 13 App. Cas. 199.
[4] See *Watson* v. *Mid-Wales Ry. Co.* (1867), L. R. 2 C. P. 593; *In re Milan Tramways Co.* (1884), 25 Ch. D. 587; *In re Asphaltic Wood Pavement Co.* (1885), 30 Ch. D. 216. Special rules apply in the case of an assignment by a defaulting trustee; they will be found in the judgment of Stirling, J., in *Doering* v. *Doering* (1889), 42 Ch. D. 203. And see *In re Moss Bay Hematite Co.* (1892), 8 Times L. R. 475; *Nelson* v. *Roberts* (1893), 69 L. T. 352; and *Christie* v. *Taunton*, [1893] 2 Ch. 175.
[5] *Young* v. *Kitchin* (1878), 3 Ex. D. 127, approved in *Government of Newfoundland* v. *Newfoundland Ry. Co.* (1888), 13 App. Cas. 199.

within the enactment." [1] "Why that which would have been a good equitable assignment before the statute should now be invalid and inoperative because it fails to come up to the requirements of the statute, I confess I do not understand. The statute does not forbid or destroy equitable assignments or impair their efficacy in the slightest degree. . . . An equitable assignment does not always purport to be an assignment nor use the language of an assignment. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice, he does so at his peril. If the assignment be for valuable consideration and communicated to the third person, it cannot be revoked by the creditor or safely disregarded by the debtor." [2]

The distinction between the two modes of procedure has been already pointed out.[3] If the assignment is not in writing, or if no notice of it has been given in writing, the assignee may still sue on it as an equitable assignment. But he must show a consideration, and strictly he must join the assignor either as a co-plaintiff or as a defendant.

But the mere fact that a contract made between A. and B. refers to C., or was entered into for the benefit of C., does not render C. an assignee of the contract or entitle him to sue on it.[4] Thus, if A. orders goods from B. to be delivered to C., C. cannot bring an action for the goods, if they be not delivered, nor is he liable for the price if they be delivered. So, if A. engages B. at a salary which he says will be paid by C., B. has no right of action against C., unless A. was C.'s

[1] *Per* Chitty, L. J., in *Durham Brothers* v. *Robertson*, [1898] 1 Q. B. at p. 771, cited with approval by Cozens-Hardy, L. J., in *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. at p. 196.

[2] *Per* Lord Macnaghten, in *William Brandt's Sons & Co.* v. *Dunlop Rubber Co.*, [1905] A. C. at pp. 461, 462.

[3] See *ante*, p. 766.

[4] *Cavalier* v. *Pope*, [1906] A. C. 428; *Cameron* v. *Young*, [1908] A. C. 176, *post*, p. 874; and see *ante*, pp. 419, 422, 423.

agent and had authority to pledge his credit.[1] But there are cases, as we have seen,[2] in which the negligent performance of a contract may entitle a third person to bring an action of tort, not of contract, if the contract was entered into with special reference to such third person.

[1] *Crocker* v. *Plymouth Corporation*, [1906] 1 K. B. 494 ; *Boston Fruit Co.* v. *British, &c., Insurance Co.*, [1906] A. C. 336.
[2] *Ante*, pp. 422, 423, 479.

## Chapter IX.

### CONTRACTS FOR THE SALE OF GOODS.

In English law a contract for the sale of goods differs from all other contracts in this important particular, namely, that the property in the goods passes from the seller to the buyer by the force of the contract itself. It is not necessary for that purpose (as it was under the law of Rome) that the goods should have been delivered to the buyer. "A contract of sale of goods is a contract whereby the seller transfers, or agrees to transfer, the property in goods to the buyer for a money consideration called the price." "Goods" include all chattels personal other than things in action and money, emblements and things attached to or forming part of the land which are agreed to be severed before sale, or under the contract of sale. The goods may be either "specific," *i.e.*, identified and agreed upon at the time the contract is made, or "unascertained," *i.e.*, defined by description only. This latter class includes "future goods," *i.e.*, such as are to be manufactured or acquired by the seller after the contract is made.[1]

"A contract of sale may be absolute or conditional. Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a 'sale'; but where the transfer of the property in the goods is to take place at a future time, or subject to some condition thereafter to be fulfilled, the contract is called an 'agreement to sell.' An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled subject to which the property in the goods is to be transferred."[1]

With the formalities required in a contract for the sale of goods we have already dealt.[2] The main provisions of the

[1] These definitions are taken from ss. 1 and 62 (1), of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

[2] See *ante*, pp. 701—708.

Act affecting other matters connected with a contract for the sale of goods are set out in the following pages.

The law relating to the sale of goods has been codified by the Sale of Goods Act, 1893,[1] which embodied the common law and most of the case law on the subject. But it leaves untouched—

(i.) the rules of bankruptcy relating to contracts of sale ;

(ii.) the rules of the common law, including the law merchant, except where they are inconsistent with the provisions of the Act, more particularly the rules relating to the law of principal and agent, and to the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause ;

(iii.) the enactments relating to bills of sale, and certain enactments affecting the sale of goods, *e.g.*, the Sale of Food and Drugs Acts.

(iv.) It also expressly excludes from its operation any transaction in the form of a contract of sale which is intended to operate by way of mortgage, pledge, charge, or other security ;[2]

(v.) and lastly, "capacity to buy and sell is regulated by the general law concerning capacity to contract and to transfer and acquire property. Where necessaries are sold and delivered to an infant, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor." "Necessaries" are goods of a kind suitable to the condition in life of the person who orders them, and actually required in the quantities ordered at the time of the order.[3]

Goods which form the subject of a contract of sale may, as we have seen, "be either existing goods owned by the seller, or goods to be manufactured or acquired by the seller after the making of the contract," which are called "future goods." It may be that the contract is "for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen," as, for example, where the subject-matter is a crop not sown at the date of the contract. If by the contract "the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell."[4] If specific goods, which are the subject-matter of a contract of sale, "have without the seller's knowledge perished at the time when the contract is made, the contract is void."[5] If specific goods, which are

[1] 56 & 57 Vict. c. 71.
[2] See s. 61.
S. 2.
[4] S. 5.
[5] S. 6, adopting the law as laid down in *Couturier* v. *Hastie* (1852), 5 H. L. Cas. 673.

the subject-matter of an agreement to sell, perish subsequently to the making of the contract "without any fault on the part of either seller or buyer before the risk passes to the buyer, the agreement is thereby avoided." [1]

"The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties." In the absence of any such determination of the price "the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case." [2]

"The omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale. Goods may be sold, and frequently are sold, when it is the intention of the parties to bind themselves by a contract which does not specify the price or the mode of payment, leaving them to be settled by some future agreement, or to be determined by what is reasonable under the circumstances." [3]

"Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such third party cannot or does not make such valuation, the agreement is avoided; provided that, if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a reasonable price therefor. Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain an action for damages against the party in fault." [4]

Contracts of sale may embody several terms either express or implied, some of which may be of vital, others only of subsidiary, importance. A breach of a term of subsidiary importance gives the aggrieved party a right to sue for damages for the breach of that term only; but a breach of a term of vital importance gives the aggrieved party the right to repudiate the contract, or to sue for damages for the breach of the contract as a whole as distinct from damages for the breach of a term. The former term is called a warranty; the latter, a condition. A warranty in a contract of sale "means an agreement with reference to goods which

[1] S. 7. "Fault" is defined to be "wrongful act or default": s. 62 (1). See *Nickoll* v. *Ashton*, [1901] 2 K. B. 126.

[2] S. 8.

[3] *Per cur.* in *Valpy* v. *Gibson* (1847), 4 C. B. at p. 864.

S. 9.

are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated." [1] "Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract." [2]

Contracts for the sale of goods often contain conditions as to time of payment or time of delivery; in such cases, "unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract." [3]

"The case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise," is not affected by the Act.[4]

In certain cases the breach of a condition may be treated as a breach of warranty.

"(a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated. . . . . .

(c) Where a contract of sale is not severable, and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract express or implied to that effect." [5]

"In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is:—

(1.) An implied condition on the part of the seller that in the case of a sale he has a right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass;" [6]

[1] S. 62.
[2] S. 11 (1).
[3] S. 10. See *Kidston* v. *Monceau Ironworks* (1902), 86 L. T. 556; and *ante*, pp. 741, 742.
[4] S. 11 (3).
[5] S. 11 (1). As to remedy for breach of warranty, see s. 53.
[6] But see *Payne* v. *Elsden* (1900), 17 Times L. R. 161, where an auctioneer sold under a bad distress warrant.

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods;

(3.) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."[1] But a condition attached to a contract of sale will not run with the goods; *e.g.*, a condition that they shall not be sold under a specified minimum price cannot be enforced against subsequent purchasers from the buyer.[2]

"Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."[3]

"Subject to the provisions of the Act and of any statute in that behalf,[4] there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose,[5] provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose;

(2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the

[1] S. 12.

[2] See *Taddy* v. *Sterious*, [1904] 1 Ch. 354; *McGruther* v. *Pitcher*, [1904] 2 Ch. 306.

[3] S. 13. See *Vigers* v. *Sanderson*, [1901] 1 K. B. 608.

[4] *E.g.*, the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 25), s. 17.

[5] *Randall* v. *Newson* (1877), 2 Q. B. D. 102. See *Preist* v. *Last*, [1903] 2 K. B. 148 (hot-water bottle); *Frost* v. *Aylesbury Dairy Co.*, [1905] 1 K. B. 608 (milk for household consumption).

manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;[1]

(3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;[2]

(4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."[3]

And independently of any express or implied condition or warranty, if the seller of goods knows them to be dangerous and the buyer to be presumably ignorant of the danger, it is his duty to warn the buyer of their dangerous character.[4]

In the case of a contract for sale by sample, *i.e.*, a contract in which there is a term either expressed or implied to that effect, the following are implied conditions:—

"(1.) That the bulk shall correspond with the sample;

(2.) That the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(3.) That the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."[5]

Next, we must deal with the question, at what moment does the property in the goods pass from the seller to the buyer? Such transfer of property generally, but not necessarily, takes place as soon as the contract is completed. But there are distinctions which must be observed between specific and unascertained, existing and future, goods. "Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and

[1] *Jones* v. *Just* (1868), L. R. 3 Q. B. 197; *Drummond* v. *Van Ingen* (1887), 12 App Cas. 284.
[2] *Jones* v. *Bowden* (1813), 4 Taunt. 847.
[3] S. 14.
[4] *Clarke* v. *Army and Navy Co-operative Society*, [1903] 1 K. B. 155.
[5] S. 15. See *Drummond* v. *Van Ingen*, *suprà*; *Wren* v. *Holt*, [1903] 1 K. B. 610 (arsenical beer).

until the goods are ascertained."[1] But "where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it should pass."[2] The Act has laid down rules[3] for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

Rule 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.[4]

When "goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him."[5] "If a vendor agrees to sell for a deferred payment, the property passes, and the vendee is entitled to call for a present delivery, without payment."[6] "The sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price and a lien upon the goods, if they remain in his possession, till that price be paid."[7]

Rule 2. Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.[8]

Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done and the buyer has notice thereof.[9]

[1] S. 16.
[2] S. 17 (1). See *Seath* v. *Moore* (1886), 11 App. Cas. at p. 370; followed in *Reid* v. *Macbeth*, [1904] A. C. 223.
[3] S. 18.
[4] See the remarks of Blackburn, J., in *Sweeting* v. *Turner* (1871), L. R. 7 Q. B. at p. 313; and of Parke, J., in *Dixon* v. *Yates* (1833), 5 B. & Ad. at p. 340.
[5] *Per cur.* in *Bloxam* v. *Sanders* (1825), 4 B. & C. at p. 948.
[6] *Per* Wilde, C. J., in *Spartali* v. *Benecke* (1850), 10 C. B. at p. 216.
[7] *Per cur.*, in *Martindale* v. *Smith* (1841), 1 Q. B. at p. 395.
[8] See *Seath* v. *Moore* (1886), 11 App. Cas. 350.
[9] See *Laing* v. *Barclay*, [1908] A. C. 35.

Rule 4. When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer:—

(a) When he signifies his approval or acceptance to the seller or does any other act adopting the transaction:

(b) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact.

A buyer of goods, who has used or sold a portion of them after discovering that they are not in accordance with the contract, cannot repudiate the contract and recover back the price of the goods.[1] The seller may, however, have acquiesced in the buyer's thus dealing with the goods. The general rule is that "a buyer cannot return a specific chattel except it be in the same state as when it was bought."[2]

If a man pledges goods received "on sale or return," the pledging is an act adopting the transaction; consequently the property passes.[3] Any act inconsistent with the return of the goods would have this effect.

Where, however, jewellery was delivered on approbation, but "to remain the property of W." (the plaintiff) "until settled for," it was held that the property in the goods had not passed out of the plaintiff. The goods had not been delivered "on sale or return or other similar terms" within the meaning of the Act.[4]

Rule 5.—(i.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(ii.) Where, in pursuance of the contract, the seller

[1] *Harnor* v. *Groves* (1855), 15 C. B. 667.
[2] *Per* Bramwell, B., in *Head* v. *Tattersall* (1871), L. R. 7 Ex. at pp. 11, 12.
[3] *Kirkham* v. *Attenborough*, [1897] 1 Q. B. 201.
[4] *Weiner* v. *Gill*, [1906] 2 K. B. 574.

delivers the goods to the buyer, or to a carrier, or other bailee or custodier (whether named by the buyer or not), for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.[1]

Sometimes the right of disposal is specially reserved to the seller. "Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled. Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal. Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him."[2]

The risk *primâ facie* passes with the property. "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. If, however, delivery has been delayed through the fault of either party, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault."[3]

The general rule of law is that no one can transfer a better title than he himself has. "Where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by

[1] See *Wait* v. *Baker* (1848), 2 Exch. at p. 7.
[2] S. 19.
[3] S. 20. The section does not "affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the party."

his conduct precluded from denying the seller's authority to sell." [1]

To this rule there are exceptions :—

"Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller." [2]

"Where the seller of goods has a voidable title thereto, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title." [3]

"Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise;" but "where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender." [4]

"Where a person having sold goods continues or is in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or

[1] S. 21 (1). The Act does not, however, affect the provisions of the Factors Act, 1889 (52 & 53 Vict. c. 45), or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof, such as the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52). Further, the Act does not affect the validity of any contract of sale under any special common law or statutory power of sale or under the order of a Court of competent jurisdiction.

[2] S. 22. Horses are not within the section. All shops in the City of London are market overt, but a show-room as distinct from the shop is not market overt: *Hargreave* v. *Spink*, [1892] 1 Q. B. 25. And see *ante*, pp. 20, 21.

[3] S. 23. But where there is no contract at all between the parties and no title whatever has passed to the person who has obtained possession of the goods, this section of course does not apply. Thus, in the well-known case of *Cundy* v. *Lindsay* (1878), 3 App. Cas. 459, Blenkarn never acquired any title to the goods, as Messrs. Lindsay believed that they were selling the goods to Blenkiron & Co.; hence the innocent purchasers from Blenkarn also acquired no title, and were compelled to restore them to Messrs. Lindsay.

[4] S. 24. See *Helby* v. *Matthews*, [1895] A. C. 471. S. 24 (2) overrides *Bentley* v. *Vilmont* (1887), 12 App. Cas. 471, and limits s. 100 of the Larceny Act, 1861 (24 & 25 Vict. c. 96), to the case of goods obtained by larceny.

documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same."[1]

"Where a person having bought or agreed to buy goods obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."[2]

With regard to the performance of the contract, "it is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them in accordance with the terms of the contract of sale."[3] "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for the possession of the goods."[4]

As to delivery, the following rules apply. In the absence of any expressed or implied agreement to the contrary, the place of delivery is the seller's place of business, if he has one; if not, his residence, except where the goods are at the time of making the contract to the knowledge of the parties in some other place, which in such case is the place of delivery. It may be that under the contract the seller is bound to send the goods to the buyer. In such case, if no time is fixed within which the seller shall send the goods to the buyer, he must do so within a reasonable time. "Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless

[1] S. 25 (1). See *Nicholson* v. *Harper*, [1895] 2 Ch. 415.

[2] S. 25 (2). The term "mercantile agent" has the same meaning as in the Factors Acts. See *Hugill* v. *Masker* (1889), 22 Q. B. D. 364. As to whether a person in possession of goods under a so-called hire-purchase agreement, who disposes of the goods or any part of them the subject of such agreement, is within the section depends upon the terms of the agreement: see *McEntire* v. *Crossley Bros.*, [1895] A. C. 457.

[3] S. 27.

[4] S. 28.

and until such third party acknowledges to the buyer that he holds the goods on his behalf. Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact. Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller." [1]

If the seller deliver to the buyer a wrong quantity of goods, whether too small or too large, the buyer may reject the whole, or he may retain the whole (or in the case where the quantity delivered is larger than that contracted for, he may retain the exact quantity and reject the rest), paying for the quantity retained at the contract rate.[2] Further, should the goods delivered be mixed with goods of a different description from those the seller contracted to sell, the buyer may reject the whole or retain such as are in accordance with the contract.[3] These rights of the buyer are, however, subject to any usage of trade, special agreement, or course of dealing between the parties. "Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments. Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller make defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not a right to treat the whole contract as repudiated." [4] "Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, is *primâ facie* deemed to be a delivery of the goods to the buyer." If the seller deliver the goods to a carrier, he must, unless otherwise agreed, make such contract with the carrier as, having regard to the nature of the goods and the other circumstances of the case, is reasonable, and, further, if the goods are to be carried by sea under circumstances under which it is usual to insure, he must, unless otherwise agreed, give the buyer notice enabling him to insure the goods.[5] "Where the seller agrees to deliver the goods at his own risk at a place other than that where the goods are when sold, the buyer must nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incidental to the course of transit." [6]

[1] S. 29. The operation of the issue or transfer of documents of title to goods is not affected by the section. As to these, see the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), and the Factors Act, 1889 (52 & 53 Vict. c. 45).

[2] S. 30 (1) and (2); and see *Harland and Wolff* v. *Burstall* (1901), 84 L. T. 324.

[3] S. 30 (3); and see *Aitken* v. *Boullen* (1908), S. C. 490.

[4] S. 31. See *Mersey Steel Co.* v. *Naylor* (1884), 9 App. Cas. 434; and *ante*, p. 754.

[5] S. 32.

[6] S. 33.

As to acceptance, the buyer is deemed to have accepted the goods, when

(i.) he intimates to the seller that he has accepted them; or

(ii.) after delivery to him he does any act in relation to them inconsistent with the ownership of the seller; or

(iii.) he retains the same without intimating within a reasonable time that he rejects them.[1]

The word "accept" in sections 27, 34, 35 and 36 does not bear the same meaning as the phrase "accept and actually receive" in section 4, which we have already discussed. Thus in *Abbott* v. *Wolsey*,[2] damages were recovered from the defendant for not accepting the goods sold, although at the same time it was held that there had been a sufficient acceptance by him to satisfy section 4.

The buyer is not deemed to have accepted goods which previously to delivery he has not examined, "unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."[3] A buyer, who has the right to refuse to accept goods delivered to him, is not bound to return them to the seller; "it is sufficient if he intimate to the seller that he refuses to accept them."[4]

"When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods;" but this does not "affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract."[5]

"The seller of goods is deemed to be an unpaid seller within the meaning of this Act:—

(a) When the whole of the price has not been paid or tendered.

[1] S. 35.
[2] [1895] 2 Q. B. 97, cited *ante*, p. 703.
[3] S. 34.
[4] S. 36.
[5] S. 37. As to repudiation, see s. 31. The seller's course would appear to be to proceed under s. 57.

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise." [1]

"Subject to the provisions of this Act,[2] and of any statute in that behalf,[3] notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law :—

(a) A lien on the goods or right to retain them for the price while he is in possession of them ;

(b) In case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them ;

(c) A right of re-sale as limited by this Act.

Further, where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage *in transitu* where the property has passed to the buyer." [4]

As to the lien mentioned above, "the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :—

(a) Where the goods have been sold without any stipulation as to credit ;

(b) Where the goods have been sold on credit, but the term of credit has expired ;

(c) Where the buyer becomes insolvent." [5]

"Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien or retention on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien or right of retention." [6]

[1] S. 38.
[2] See s. 43, *post*, p. 798, and s. 55.
[3] Cf. the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), and the Factors Act, 1889 (52 & 53 Vict. c. 45).
[4] S. 39.
[5] S. 41. An agent, bailee, or custodier for the buyer is in the same position.
[6] S. 42.

"The unpaid seller of goods loses his lien or right of retention thereon,

(a) When he delivers the goods to a carrier or other bailee or custodier for the purpose of transmission to the buyer without reserving the right of disposal of the goods;

(b) When the buyer or his agent lawfully obtains possession of the goods;

(c) By waiver thereof.

The unpaid seller of goods, having a lien or right of retention thereon, does not lose his lien or right of retention by reason only that he has obtained judgment or decree for the price of the goods."[1]

Stoppage *in transitu* is a remedy given, when the buyer becomes insolvent,[2] to the unpaid seller who has parted with the possession of the goods. It is, in fact, a right so long as the goods are in course of transit to resume possession of them and to retain them until payment or tender of the price.[3] "Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, takes delivery of them from such carrier or other bailee or custodier. If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end. If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer, or his agent, the transit is at an end, and it is immaterial that a further destination for the goods may have been indicated by the buyer. If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to

[1] S. 43. "Custodier," "right of retention," and "decree" are Scotch terms.

[2] *I.e.*, has ceased to pay or cannot pay his debts when they become due, whether he has committed an act of bankruptcy or not: see s. 67, sub-s. 3.

[3] S. 44, adopting the law as laid down in *Lickbarrow* v. *Mason* (1794), 1 Smith L. C., (11th ed.) 693.

be at an end, even if the seller has refused to receive them back. When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent to the buyer. Where the carrier or other bailee or custodier wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf, the transit is deemed to be at an end. Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped *in transitu*, unless such part delivery has been made under such circumstances as to show an agreement to give up possession of the whole of the goods." [1]

As to the method of exercising the right, the Act provides that "the unpaid seller may exercise his right of stoppage *in transitu* either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee or custodier in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the latter case the notice, to be effectual, must be given at such time and under such circumstances that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer. When notice of stoppage *in transitu* is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery must be borne by the seller." [2]

"Subject to the provisions of the Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition

[1] S. 45.
[2] S. 46.

for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee." [1]

As a general rule, "a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or retention or stoppage *in transitu*. But where an unpaid seller who has exercised his right of lien or retention or stoppage *in transitu* re-sells the goods, the buyer acquires a good title thereto as against the original buyer. So, too, where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract. Again, where the seller expressly reserves a right of re-sale in case the buyer should make default, and, on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages." [2]

If the property in the goods has passed to the buyer, or if the price is by the contract payable on a certain day irrespective of delivery and the buyer wrongfully neglects or refuses to pay the price, the seller may recover the same in an action against the buyer.[3] If the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may recover damages in an action against the buyer for not accepting them.[4]

Where the seller wrongfully neglects or refuses to deliver, the buyer may recover, in an action for non-delivery, the damages directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.[5]

In actions for non-delivery, "where there is an available market for the goods in question, the measure of damages is *primâ facie* to be

[1] S. 47. See *Kemp* v. *Falk* (1882), 7 App. Cas. 573.
[2] S. 48.
[3] S. 49.
[4] S. 50.
[5] S. 51 (2). This is an application of the rule in *Hadley* v. *Baxendale* (1854), 9 Exch. 341; see also *Hammond* v. *Bussey* (1887), 20 Q. B. D. 79.

ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of refusal to deliver."[1] Corresponding rules define the measure of damages in an action against the buyer for not accepting goods.[2] If the seller was by the contract bound to deliver specific or ascertained goods, "the Court may, if it thinks fit, direct that the contract shall be specifically performed, without giving the defendant the option of retaining the goods on payment of damages."[3]

"Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price; or (b) maintain an action against the seller for damages for the breach of warranty. The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. In the case of breach of warranty of quality such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage."[4]

The Act provides with regard to sales by auction as follows:—"Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale. A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is

[1] S. 51 (3). As to contracts for delivery by instalments, see *Roper* v. *Johnson* (1873), L. R. 8 C. P. 167; *Brown* v. *Muller* (1872), L. R. 7 Ex. 319; *Johnstone* v. *Milling* (1886), 16 Q. B. D. 460.

[2] S. 37, *ante*, p. 796.

[3] S. 52.

[4] S. 53. In *Chapman* v. *Withers* (1888), 20 Q. B. D. 824, a horse sold with a warranty was killed through no fault of the buyer, and the buyer successfully sued for breach of warranty, though he could not by returning the horse comply with a condition of the sale that the horse should be returned by an agreed time if the buyer contended it did not correspond with the warranty. As to recovery of special damage, see *Bostock* v. *Nicholson*, [1904] 1 K. B. 725.

made any bidder may retract his bid. Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer. A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller. Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf may bid at the auction."[1]

[1] S. 58. As to an auctioneer's authority, see *post*, p. 847.

## Chapter X.

### NEGOTIABLE INSTRUMENTS.

"A NEGOTIABLE instrument is one the property in which is acquired by every person who takes it *bonâ fide* and for value, provided that the instrument is such and in that state that the true owner could transfer the contract or engagement contained therein by simple delivery of the instrument."[1] Thus, if the instrument be payable to "A.B. or bearer," the property in it will pass from hand to hand with the instrument, and any one who is lawfully in possession of it for value can sue upon it. But if the instrument be payable to "A.B. or order" and it has not yet been indorsed by A.B., no third person can sue upon it, although he may be lawfully in possession of it. Until it has been so indorsed, it is not in such a condition that the right to enforce the contract contained in it can be transferred to a stranger by simple delivery of the instrument.

A negotiable instrument, therefore, differs from an ordinary chose in action in that—

(i.) no notice of transfer is necessary to complete the holder's title to sue upon it, and

(ii.) it is not liable to be defeated by defences which might have prevailed against the transferor, if it changes hands before payment.

It differs, as a rule, from an ordinary simple contract in three respects:—

(i.) Consideration will be presumed until the contrary appear, or at least until suspicion has been thrown upon the holder's title.

[1] This is the definition given by Judge Willis in his book on Negotiable Securities, 2nd ed., p. 6; it is the best we know.

(ii.) Any antecedent debt or liability is deemed valuable consideration, whether the payment be due on demand or at a future time. In other words, no fresh advance need be made or any other fresh consideration given at the time the instrument is drawn up between the parties. Past consideration will not support an ordinary simple contract.

(iii.) If there be any fresh consideration, it is immaterial from whom it moves; whereas in the case of an ordinary simple contract the consideration must have moved from the plaintiff.

The negotiable instruments which are in most frequent use are bills of exchange, promissory notes, and cheques. The law relating to these has been codified, and in some respects altered, by the Bills of Exchange Act, 1882.[1]

These instruments were unknown to the common law; they owe their origin to the Law Merchant, *i.e.*, to that body of mercantile customs which foreign merchants in the Middle Ages appear to have accepted and to have declared to be binding upon themselves in all the great cities of Europe. The Law Merchant did not strictly become part of the law of England until it was sanctioned and recognised by the decisions of our Courts of Justice and subsequently by statute.

Bills of exchange were brought into mercantile use in Europe by Italian merchants as early as the fourteenth century, though the first case reported in England as to a bill of exchange appears in the year 1603.[2] At first their use was confined to foreign bills between English and foreign merchants; for our Courts of law dreaded innovation and were reluctant to give general effect to bills of exchange as negotiable instruments. But they subsequently recognised the negotiability of bills of exchange between English traders, and finally of bills of all persons whether traders or not. Promissory notes were also in use in this country in the seventeenth century; but their negotiable character was not fully established until the passing of the statute 3 & 4 Anne, c. 9.[3] Cheques are instruments of a more modern date; they are now regarded as a species of bills of exchange.

### *Bills of Exchange.*

According to the statutory definition "a bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the

[1] 45 & 46 Vict. c. 61.

[2] *Martin* v. *Boure* (1603), Cro. Jac. 6.

[3] See the judgment of Lord Holt, C. J., in *Buller* v. *Crips* (1703), 6 Mod. at pp. 29, 30.

person to whom it is addressed to pay on demand or at a fixed or determinable future time a certain sum in money to or to the order of a specified person, or to bearer." [1]

An ordinary form of bill of exchange will run as follows :—

£100. London, June 1st, 1908.

[Three] months after date [*or* On demand, *or* At sight, *or* At [ten] days after sight,] pay C. D. or order [*or* bearer, *or* to my order] one hundred pounds.

To E. F., Merchant, of ——. A.B.

In this case A.B. is called the drawer, E.F. the drawee, and C.D. the payee. The bill must be in writing : it need not be dated (unless the date is required in order to fix the day for payment); it need not contain the words "value received," or specify the value given; it need not specify the place where it is drawn or the place where it is payable.[2]

It must be an unconditional order in writing. An order to pay out of a particular fund is not a bill ; "but an unqualified order to pay, coupled with (i.) an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount, or (ii.) a statement of the transaction which gives rise to the bill, is unconditional" within the meaning of the Act.[3] "Please let bearer have £100 and you will much oblige me,"[4] and "We authorize you to pay,"[5] have been held not to be bills.

The order must be to pay on demand, or at a fixed or determinable future time. "A bill is payable 'on demand' which is expressed to be payable on demand, at sight, on presentation, or in which no time for payment is expressed."[6] A bill is payable "at a future determinable time" when it is "expressed to be payable at a specified period after date or sight, or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of its happening may be uncertain." [7]

Thus a bill drawn (i.) "three months after date," or (ii.) "three months after sight," or (iii.) "three months after the death of A.," would be valid, for each is payable on the occurrence of an event which must happen.

[1] 45 & 46 Vict. c. 61, s. 3 (1).
[2] S. 3 (4).
[3] S. 3 (3).
[4] *Little* v. *Slackford* (1828), 1 M. & M. 171.
[5] *Hamilton* v. *Spottiswoode* (1849), 4 Exch. 200.
[6] S. 10 (i.). "At sight" merely means "on demand."
[7] S. 11.

But an instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect.[1] "Pay C. or order £100 when I marry D.,"[2] or "when I am in good circumstances,"[3] or "ninety days after sight or when realised,"[4] are invalid orders to pay. But the following are valid, being payable at a determinable future time:— "Pay one year after my death,"[5] or "two months after the ship X. is paid off."[6]

The order must be for the payment of a sum certain in money. Therefore an order to deliver goods, or to pay money and do some other act in addition, is not a bill.[7] But the sum payable will be certain, although it is required to be paid with interest, or by stated instalments with or without a provision that upon default in payment of any instalment the whole shall become due, or according to a rate of exchange indicated by, or to be ascertained according to, the directions of the bill.[8]

It is essential to the validity of the bill that the drawee or drawees should "be named or otherwise indicated therein, with reasonable certainty;" otherwise the payee would not know to whom he should present the bill for acceptance.[9] "A bill may be addressed to two or more drawees whether they are partners or not; but an order addressed to two or more drawees in the alternative, or to two or more drawees in succession, is not a bill of exchange."[10] "Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty."[11] An instrument payable "to —— order" is construed to mean payable "to my order," *i.e.*, to the drawer's order.[12]

The person to whom the bill is addressed (the drawee) may "accept" the bill by signifying his assent to the order of the drawer. He accepts by signing his name across the face of

[1] S. 11.
[2] *Pearson* v. *Garret* (1689), 4 Mod. 242.
[3] *Ex parte Tootell* (1798), 4 Ves. 372.
[4] *Alexander* v. *Thomas* (1851), 16 Q. B. 333.
[5] *Roffey* v. *Greenwell* (1839), 10 A. & E. 222.
[6] *Colehan* v. *Cooke* (1742), Willes, 393.
[7] S. 3 (2).
[8] S. 9 (1).
[9] S. 6 (1).
[10] S. 6 (2).
[11] S. 7 (1).
[12] *Chamberlain* v. *Young*, [1893] 2 Q. B. 206.

the bill, thus, "Accepted, E. F." or simply "E. F." The acceptance "must be written on the bill, and signed by the drawee:" it will be invalid if it expresses "that the drawee will perform his promise by any other means than the payment of money."[1] As soon as the drawee accepts the bill he is called the acceptor.

In all cases where the bill is drawn "pay to my order" (no third person being named in it as payee), "the holder may treat the instrument at his option either as a bill of exchange or as a promissory note."[2] "Where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer."[3] A bill may be so treated where the person named as payee (and to whose order the bill is made payable on the face of it) is a real person but has not, and never was intended by the drawer to have, any right upon it or arising out of it. This is so, though the so-called bill is really nothing more than a document in the form of a bill manufactured by a person who forges the signature of the named drawer, obtains by fraud the signature of the acceptor, forges the signature of the named payee, and presents the document for payment, both the persons named as drawer and drawee being entirely ignorant of the circumstances.

In *Bank of England* v. *Vagliano Brothers*,[4] a clerk of the defendants forged advice letters and drafts and obtained payment of the latter, and appropriated the money to his own use. He prepared the drafts by filling in, as the name of the drawer, that of a foreign correspondent of the defendants, and, as the name of the payee, that of a foreign firm, which was an existing firm and a correspondent of the defendants, and then procured the acceptance of his employers, the defendants, to these drafts. Their Lordships held that Vagliano Brothers, and not the Bank of England, must bear the loss, on the ground that the named payee was a fictitious or non-existing person within the meaning of the section, and that therefore the documents might be treated as payable to bearer.

This decision was approved in *Clutton* v. *Attenborough*;[5] it has been discussed in *Vinden* v. *Hughes*,[6] where a clerk fraudulently inserted the name of a genuine customer, stole the cheque, and appropriated the

[1] S. 17. See *Russell* v. *Phillips* (1850), 14 Q. B. 891.
[2] S. 5 (2).
[3] S. 7 (3).
[4] [1891] A. C. 107.
[5] [1897] A. C. 90, 95.
[6] [1905] 1 K. B. 795, followed in *Macbeth* v. *North and South Wales Bank*, [1906] 2 K. B. 718; [1908] 1 K. B. 13; [1908] A. C. 137.

proceeds, his firm supposing the cheque to be drawn in the ordinary course of business. In this case Warrington, J., held that the customer's name was not the name of a fictitious person within the meaning of the Act.

So in *North and South Wales Bank* v. *Macbeth*,[1] A., induced by the fraud of W., drew a cheque to the order of K., an existing person, and intended him to be the payee: W. forged K.'s indorsement and paid the cheque into his own account at his bankers, who received the amount of the cheque from A.'s bank. It was held that A., the drawer, could recover the amount of the cheque from W.'s bankers, the payee not being held to be a "fictitious" person.

Acceptance may be "general" or "qualified." To write, "Accepted, E. F." or "E. F." is to make a general acceptance. To insert words which unmistakably vary the effect of the bill as drawn[2] is to make a qualified acceptance. For example, acceptances are "qualified" if made conditionally ("if sufficient funds"), or partially ("as to £25 only"), or locally (at a particular place only); or there may be a qualification as to time, or as to the acceptance of other drawees.[3] The holder may refuse a qualified acceptance, and treat the bill as dishonoured.[4]

"A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely:—

(*a*) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact:

(*b*) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

In particular the title of a person who negotiates a bill is defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."[5]

[1] [1908] A. C. 137.
[2] See *Meyer* v. *Decroix*, [1891] A. C. 520.
[3] S. 19.
[4] S. 44.
[5] S. 29 (1) and (2).

"Every holder of a bill is deemed to be a holder in due course," and so the *onus* lies on the party liable to prove that the acceptance, issue, or subsequent negotiation of the bill was defective owing to fraud, duress, undue influence, &c. If he succeeds in so doing, the holder must prove that he gave value for the bill, and gave such value in good faith.[1] A holder in due course without notice of any defect in the title of the person from whom he takes the bill gets a good title thereto. But a holder in due course without notice under a forged indorsement gets no title whatever;[2] he cannot enforce payment against any party to the instrument.

From the definition of a holder in due course we see that, in order to become such a holder, the bill taken must be "complete and regular on the face of it" at the time at which it is so taken, *i.e.*, it must be in such a condition that the property in it can be acquired by the person taking.

A good illustration of this is seen in the case of *Whistler* v. *Forster*.[3] There a man took a cheque from X. payable to X. or his order *bonâ fide* and for value, but forgot to notice that X.'s indorsement was not on the cheque. Subsequently, and before obtaining X.'s indorsement thereto, he learnt that X. had obtained the cheque by fraud. It was held that when he first took the cheque it was not complete and regular on the face of it, and therefore that he was not a holder in due course, and that after obtaining X.'s indorsement thereto he could not recover because, although he had given value in good faith for it, he had notice of the defect in title of X., who negotiated it. The indorser of a bill not "complete and regular on the face of it" is not liable.[4]

Again, to satisfy the definition, the holder of the bill must have taken it before it became overdue. The consequences of taking a negotiable instrument when it is overdue are dealt with later,[5] but we may say here that by so doing the person taking it holds it subject to any defect of title in the transferor. If the bill, although not overdue, has been dishonoured, then the person taking it does so subject to any defect of title attaching thereto when dishonoured.

[1] S. 30 (2); and see *Tatam* v. *Haslar* (1889), 23 Q. B. D. 345.
[2] Under Austrian law a holder in due course under a forged indorsement gets a good title: see *Embiricos* v. *Anglo-Austrian Bank*, [1905] 1 K. B. 677.
[3] (1863), 14 C. B. N. S. 248.
[4] *Jenkins & Sons* v. *Coomber*, [1898] 2 Q. B 168.
[5] See *post*, p. 818.

To be a holder in due course the person taking the bill must have taken it for value. For if he gives no value whatsoever for the bill, it is a gift, and he cannot claim the instrument as against the true owner who may have been defrauded. It does not matter how small the amount given be, provided it be given in good faith. Its smallness, however, may tend to show that it was not given in good faith; it may be some evidence, for instance, that the person taking the bill knew or had a suspicion that the title of the person from whom he took it was defective. Again, even if the holder be negligent in taking the bill, he will not be deprived of his property in it, if he took it *bonâ fide*, though gross negligence may be some evidence of bad faith.

"Honest acquisition confers title . . . . negligence of the holder makes no difference in his title. However gross the holder's negligence, if it stop short of fraud, he has a title."[1] "Negligence or carelessness, when considered in connection with the surrounding circumstances, may be evidence of *mala fides*."[2]

The fact that the circumstances under which the holder took the bill ought to have caused him to suspect, or would have caused any reasonable man to suspect, that something was wrong will not alone prevent him from being a *bonâ fide* holder. The question is not whether he *ought* to have suspected, but whether he *did* suspect. On this point the following passage from the judgment of Lord Blackburn in *Jones* v. *Gordon*[3] clearly states the law: "I consider it to be fully and thoroughly established that, if value be given for a bill of exchange, it is not enough to show that there was carelessness, negligence or foolishness in not suspecting that the bill was wrong, when there were circumstances which might have led a man to suspect that. All these are matters which tend to show that there was dishonesty in not doing it, but they do not in themselves make a defence to an action upon a bill of exchange. I take it that in order to make such a defence . . . . it is necessary to show that the person who gave value for the bill, whether the value given be great or small, was affected with notice that there was something wrong about it when he took it. I do not think it is necessary that he should have notice of what the particular wrong was. If a man, knowing that a bill was in the hands of a person who had no right to it, should happen to think that perhaps the man had stolen it, when if he had known the real truth he would have found, not that the man had stolen it, but that he had obtained it by false pretences,

[1] *Per* Byles, J., in *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. at pp. 184, 185.
[2] *Per* Baggallay, L. J., in *In re Gomersall* (1875), 1 Ch. D. at p. 146.
[3] (1877) 2 App. Cas. at pp. 628, 629.

I think that would not make any difference if he knew that there was something wrong about it and took it. If he takes it in that way, he takes it at his peril. But then I think that such evidence of carelessness or blindness as I have referred to may with other evidence be good evidence upon the question which, I take it, is the real one, whether he did know that there was something wrong in it. If he was . . . . honestly blundering and careless, and so took a bill of exchange or a bank-note when he ought not to have taken it, still he would be entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, come to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind, 'I suspect there is something wrong, and if I ask questions and make further inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover,' I think that is dishonesty."

There is some conflict of opinion as to whether the payee of a promissory note, who gives value in good faith for it, is a holder in due course. Section 29 of the Act of 1882 contains the words "at the time the bill was negotiated to him." In *Lewis* v. *Clay*,[1] Russell, C. J., expressed his opinion (*obiter*) that a *bonâ fide* payee for value of a note was not a holder in due course, because he was one of the immediate parties to the note and not "a person to whom, after its completion by and as between the immediate parties, the note has been negotiated." And this opinion was followed by the Divisional Court in *Herdman* v. *Wheeler*.[2] On the other hand, the judges in the last-named case said that they were not prepared to hold that a payee of a note could never be a holder in due course. And in *Lloyd's Bank* v. *Cooke*,[3] although the Court of Appeal based their judgment on another ground and so held that it was unnecessary to decide whether the payees of promissory notes were holders in due course, Fletcher Moulton, L. J., rested his decision also on the ground that they were holders in due course.

A bill is negotiated or transferred to third parties in various ways. If the bill be payable to bearer, it may be transferred by mere delivery to such third party with intention of passing the property therein.[4] But the party so transferring the bill is not liable on it himself; his signature is essential if he is to be made liable on the bill.[5] Nor is he liable on the consideration for which he transferred the bill, should it be

[1] (1897) 14 Times L. R. 149, 150.
[2] [1902] 1 K. B. 361, 371.
[3] [1907] 1 K. B. 794; and see *Smith* v. *Prosser*, [1907] 2 K. B. 735.
[4] S. 31 (2).
[5] S. 23.

dishonoured. But he is not altogether free from liability, for by so transferring the bill he warrants his title, and also that the bill is what it purports to be.[1] He is, in fact, in the position of an ordinary vendor, and such warranty of genuineness is an incident of the contract of sale. If the bill be payable to order, it is negotiated by the holder indorsing it and delivering it to the indorsee. If he transfers such a bill for value without indorsing it, the transferee only gets such title as the transferor had in the bill, but has the right to have the transferor's signature thereto.[2]

An indorsement may be either "in blank" or "special."[3] An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer. But any subsequent holder of a bill thus indorsed in blank can convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person. A special indorsement is one which specifies the person to whom, or to whose order, the bill is to be payable.

Again, on transferring the bill the transferor may indorse the bill "restrictively." A restrictive indorsement is one which prohibits the further negotiation of the bill, *e.g.*, "pay X. only," or which authorizes the indorsee to deal with the bill only in a certain way, *e.g.*, "pay D. or order for collection."[4] Such indorsee can receive payment of the bill, and sue any party thereto that his indorser could have sued, but he cannot transfer his rights as indorsee unless expressly authorized to do so by the restrictive indorsement under which he has taken the bill.

If the indorser has indorsed the bill "conditionally," the condition may be ignored by the payer, who may pay the indorsee holder without troubling whether as between such indorsee and indorser the condition has been fulfilled.[5]

The position of the indorser of a bill of exchange may be

[1] *Gurney* v. *Womersley* (1854), 24 L. J. Q. B. 46.
[2] S. 31 (4); and see *Day* v. *Longhurst*, [1893] W. N. 3.
[3] S. 32 (6).
[4] S. 35.
[5] S. 33.

shortly said to be that of a surety for the acceptor, and so a bill that has passed through the hands of several substantial firms and contains their indorsements is a valuable security for money. If the acceptor of the bill has deposited any securities with the holder, the indorser, who pays the bill on failure of the acceptor to meet his liability thereon, is entitled to such securities. But in order to render the indorser or indorsers liable on the bill when it has been dishonoured by non-acceptance or non-payment by the drawee, notice must be given of such dishonour to such indorsers as it is sought to make liable. If not, they will be discharged from liability.[1] Any indorser, however, may insert in the bill an express stipulation negativing or waiving as regards himself the necessity for any notice of dishonour.

If a bill be payable "to order," the indorsement "must be written on the bill itself and signed by the indorser;" otherwise it will not be negotiable.[2] Such indorsements are nearly always placed on the back of the bill, or, if there be no room on the back of the bill, on an allonge (a slip of paper attached to the bill); but an indorsement on the face of the bill would be a perfectly valid indorsement.[3] The simple signature of the indorser without any additional words is sufficient.[2] It should be noted that an express promise, even though in writing, to indorse a bill is not an indorsement. Again, to be a valid indorsement it must be an indorsement of the entire bill; partial indorsement, *e.g.*, "pay A.B. £100 of the within £200," is insufficient. If the bill is payable to order of two or more payees who are not partners, all must indorse unless one has authority to indorse for the others. Should the payee's name be wrongly spelt he may indorse the bill as he is therein named, adding, if he think fit, his proper signature.[4]

Although, as we have seen, any indorser by placing his name on the bill becomes liable upon it to the holder, he may insert a stipulation negativing or limiting such liability, *e.g.*, he can indorse the bill to D. thus, "Pay D. or order without recourse to me," or "Pay D. or order *sans recours*."[5]

"The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in the case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think

[1] For cases when no notice to indorsers is necessary, see *post*, p. 820.
[2] S. 32 (1).
[3] *Young* v. *Glover* (1857), 3 Jur. N. S. 637.
[4] S. 32 (2), (3) and (4).
[5] S. 16.

fit."[1] Before doing so, however, he must protest, or note for protest, the bill for such non-acceptance or non-payment.

The "protest" of a bill of exchange is a formal instrument sealed by a notary, attesting the presentment of the bill and its dishonour. After presentment and dishonour, the notary "notes" the bill by writing on it his initials and charges, the date and a reference to his books. The protest includes a copy of the bill and gives details of the demand and answer, &c.

Unless a foreign bill be protested for dishonour, the drawer and indorsers are discharged. It is not necessary to note or protest an inland bill for dishonour, though evidence of due presentment is thus obtained.

Where a bill is payable "to bearer" and therefore transferable by delivery, and loss occurs by theft or accident, the thief or finder may confer a title by transferring it. On the other hand, where a bill is payable "to order" and therefore transferable by indorsement only, he cannot confer such title except as against himself: for if indorsement is necessary to the transfer of a bill, the indorsement will convey no title except as against the person making it, unless it be made by one who has a right to make the transfer.

When a bill of exchange has been indorsed to a third person, we have two new characters, indorser and indorsee. The first indorsement can only be made by the payee, who afterwards is always called the indorser. But each subsequent indorsee will also become an indorser, as soon as he in his turn indorses the bill to a fresh indorsee. A transfer by indorsement vests in the indorsee a right of action against all the parties whose names are on the bill in case of default of acceptance or payment. Every indorser of a bill is in the nature of a new drawer, and is liable to every succeeding holder in default of acceptance by the drawee or of payment if the drawee has accepted the bill. Once the drawee has accepted the bill, he is primarily liable as acceptor to any holder in due course; the drawer and each subsequent indorser is collaterally liable to the holder, provided he takes the steps required by law.

In the contract created by a bill of exchange the acceptor is regarded as the principal contractor; his engagement is that

[1] S. 15.

he will pay the bill according to the tenor of his acceptance,[1] although he need not take precautions to prevent the fraudulent alteration of the bill after acceptance.[2] But he "is precluded from denying to a holder in due course :—

(1.) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill.

(2.) In the case of a bill payable to the drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement.

(3.) In the case of a bill payable to the order of a third person, the existence of the payee, and his then capacity to indorse, but not the genuineness or validity of his indorsement."[3]

Should the drawee make default in accepting the bill, an immediate right of recourse (subject to the provisions of the Act as to acceptances for honour[4]) accrues to the holder against the drawer and indorsers. No presentment for payment is necessary ; the holder can sue the drawer at once for the full amount of the bill.[5] The effect of the refusal to accept is that the drawee says to the holder, "I will not pay your bill, you must go back to the drawer and he must pay you."

"The drawer of a bill, by drawing it, engages that on due presentment it shall be accepted and paid according to its tenor and that, if it be dishonoured, he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken. He is further precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse." [6]

The indorsers are looked upon as his sureties, for the indorser only engages that "he will compensate the holder, or a subsequent indorser who is compelled to pay the bill," if on due presentment it is dishonoured by the acceptor, provided that the requisite proceedings on dishonour be duly taken. "He is further precluded from denying to a

[1] S. 54 (1).
[2] See *Scholfield* v. *Earl of Londesborough*, [1896] A. C. 514.
[3] S. 54 (2).
[4] As to acceptance and payment for honour, *supra* protest, see ss. 65, 68.
[5] S. 43 (2).
[6] S. 55 (1).

holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements; and to his immediate or subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto."[1]

"An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not."[2] Where there is an accommodation party, the bill is called an accommodation bill. The mere payment of commission to a party for the use of his name does not amount to value received for the bill; the bill may therefore in such a case be an accommodation bill.[3] When a holder for value becomes aware that a party to a bill is an accommodation party, the ordinary rules of suretyship apply.[4]

An accommodation party can use any defence which was available for the party accommodated; he has a right to be indemnified by the latter against liability on the bill and against the costs of the proceedings taken thereon.[5]

"Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course."[6] And any person who places his name upon a bill, whether as drawer, acceptor or indorser, will thereby render himself personally liable to a holder in due course, unless he makes it quite clear that he signs his name merely as agent for some one else or in a representative character. "But the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability."[7]

[1] S. 55 (2).
[2] S. 28 (1) and (2).
[3] *Overend, Gurney & Co.* v. *Oriental Financial Corporation* (1874), L. R. 7 H. L. 348.
[4] *Rouse* v. *Bradford Banking Co., Ltd.*, [1894] A. C. 586.
[5] *Hammond* v. *Bussey* (1887), 20 Q. B. D. 79.
[6] S. 56. As to the liabilities of persons indorsing as co-sureties, see *Macdonald* v. *Whitfield* (1883), 8 App. Cas. 733.
[7] S. 26 (1).

"Is it not a universal rule," said Lord Ellenborough, C. J.,[1] "that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another, or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he is liable."

Where a bill of exchange is accepted or indorsed *per procuration*, such signature "operates as notice that the agent has but a limited authority to sign. The principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority."[2] The addition to the signature of the words "by procuration" (*p.p.*, *per proc.*, &c.) puts the taker of the bill upon inquiry as to the extent of the agent's authority.

Thus, where A. had authority to fill up a blank promissory note to himself for £15, and he filled it up for £30, and B. took it for value without notice of the fraud, it was held that B. could not sue the maker.[3]

"The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm."[4] In the case of a limited company, "a bill of exchange or promissory note shall be deemed to have been made, accepted or indorsed on behalf of a company, if made, accepted or indorsed in the name of the company, or by or on behalf or on account of the company by any person acting under its authority."[5] Any such person signing any bill, note, indorsement or cheque without mentioning the correct name of the company (with the addition of the word "limited"[6]) is personally liable to the holder on the bill, unless the company duly pays, and is further liable to a penalty of £50.[7]

The transfer of a bill by indorsement may be either before or after acceptance, either before or after it has arrived at maturity. "Where a bill which is not overdue has been dishonoured, any person, who takes it with notice of the dishonour, takes it subject to any defect of title attaching

[1] *Leadbitter* v. *Farrow* (1816), 5 Maule & Selwyn, at p. 349.
[2] S. 25.
[3] See s. 20; and *Herdman* v. *Wheeler*, [1902] 1 K. B. 361; *Jacobs* v. *Morris*, [1902] 1 Ch. 816.
[4] S. 23 (2). But if a partner signs a bill in the firm's name in respect of business outside the scope of the partnership, he will not bind his co-partners: *Wheatley* v. *Smithers*, [1906] 2 K. B. 321; see *post*, p. 852.
[5] Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 77.
[6] *Penrose* v. *Martyr* (1858), E. B. & E. 499.
[7] 8 Edw. VII. c. 69, s. 63.

thereto at the time of dishonour, but this does not apply to a holder in due course. If an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.[1]

"A bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time; what is an unreasonable length of time is a question of fact."[2] Since this provision applies also to cheques,[3] anyone who takes a "stale" cheque does so at his peril. It does not apply to promissory notes.[4]

A bill payable otherwise than on demand becomes due under ordinary circumstances on the fourth day inclusive, or on the third day exclusive, of that on which the bill is expressed to be payable. Three "days of grace" are allowed in addition to the time fixed by the bill, unless the bill be payable on demand or unless the bill provides otherwise.[5] Until the last day of grace expires, the holder of a bill, in respect of which payment has been refused, has no cause of action.[6]

Immediately it becomes due the holder should present it, or cause it to be presented, to the acceptor for payment. If on presentment the bill be refused payment, then notice of dishonour must be given to every party (other than the acceptor) whose name appears upon the bill, and against whom the holder may wish to secure a remedy.

A bill may be dishonoured in two ways[7]—(i.) By non-acceptance, when, after due presentment, acceptance is refused or cannot be obtained, or if presentment is excused, the bill is not accepted; (ii.) by non-payment, when, after due presentment, payment is refused or cannot be obtained,

[1] S. 36 (2) and (3). For an instance of this rule, see *Holmes* v. *Kidd* (1858), 3 H. & N. 891.
[2] S. 36 (5).
[3] See s. 73.
[4] S. 86 (3).
[5] Ss. 14, 72 (5).
[6] *Kennedy* v. *Thomas*, [1894] 2 Q. B. 759.
[7] Ss. 43 (1), 47 (1).

or if presentment is excused, the bill is overdue and unpaid.

When a bill of exchange has been presented and dishonoured either by non-acceptance or non-payment, an immediate right of recourse (subject to the provisions of the Act as to acceptance for honour[1]) accrues to the holder against the drawer and all other prior parties to the bill.[2] In the former case, no subsequent presentment for payment is necessary, nor any notice of subsequent dishonour by non-payment, unless in the meantime the bill has been accepted. In any case notice must be given to all the parties to the bill whom the holder intends to make liable upon it, and any holder or indorser to whom such notice is not given will be discharged, subject to this, that where the bill has been dishonoured by non-acceptance and due notice of dishonour has not been given, the rights of the holder in due course, subsequent to the omission, will not be prejudiced thereby.[3]

Notice of dishonour, in order to be valid and effectual, must be given in accordance with the rules contained in section 49 of the Act. Their effect may be briefly summarised as follows:—Notice must be given by or on behalf of the holder or any indorser then liable on the bill, and when given enures for the benefit, in the one case, of subsequent holders and all prior indorsers to whom the party so giving notice is liable: in the other, for that of the holder and all indorsers subsequent to the party to whom it is given. Notice may be given orally or in writing, or by both combined; no special form is necessary if the bill is sufficiently identified and the fact of dishonour clearly intimated. The return of a dishonoured bill to the drawer or an indorser is sufficient notice. In case of death, notice may be given to the personal representative: if the party be bankrupt, either to him personally or to his trustee. Where there are two or more drawers or indorsers not being partners, notice must be given to each, unless one has authority to receive it on behalf of all.

Further, this notice must be given within a reasonable time; what is a reasonable time for this purpose is explained in the Act.[4] If the parties reside in the same place, notice must be sent so as to arrive on the next day; if in different places, it should be sent off on the day following the dishonour, if there is a convenient post: if not by the next post thereafter. Each party receiving notice has the same time to send it on to his

[1] See ss. 65—68.
[2] Ss. 43 (2), 47 (2).
[3] S. 48.
[4] S. 49 (12).

antecedent party as has a principal receiving notice from his agent. The notice is deemed given when posted, in spite of any miscarriage of the post-office.[1]

"Delay in giving notice of dishonour will be excused where the delay is caused by circumstances beyond the control of the party giving notice and not imputable to his default, misconduct, or negligence; when, however, the cause of delay ceases to operate, the notice must be given with reasonable diligence."[2] It must, of course, be given before the writ is issued, as the *onus* lies upon the plaintiff of showing that his right of action was complete before the commencement of the suit.[3]

Notice of dishonour will, however, be dispensed with in cases where "after the exercise of reasonable diligence due notice cannot be given to or does not reach the drawer or indorser sought to be charged;" or by waiver express or implied either before or after the time when notice should be given. It will also be dispensed with as regards the drawer: "(1) where drawer and drawee are the same person; (2) where the drawee is a fictitious person or without the capacity to contract; (3) where the drawer is the person to whom the bill is presented for payment; (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill; (5) where the drawer has countermanded payment."[4]

The position of the indorser of a bill differs from that of a drawer. The indorser is in the nature of a surety or guarantor of the payment of the bill on its due presentment; he is presumed to know nothing about the arrangement between the drawee and drawer. As regards the indorser, therefore, notice (save as mentioned above) will only be dispensed with (1) where he knew at the time of indorsement that the drawee was a fictitious person or without the capacity to contract; (2) where he is himself the person to whom the bill is presented for payment; or (3) where the bill was accepted or made for his accommodation.[4]

Save in these excepted cases, knowledge of the probability however strong that the bill will be dishonoured, cannot operate as a notice of dishonour or dispense with it.[5] Nor will mere knowledge of the fact that the bill has been dishonoured be equivalent to notice, for "notice means something more than knowledge."[6] Besides, it is quite competent to the holder of a bill to give credit to the acceptor, and the effect of this would be to discharge the parties collaterally liable on the bill. A notice of dishonour must accordingly be given by the holder as an intimation that he intends to charge the persons to whom he gives such notice, and not merely to look to the acceptor. Any drawer or indorser, to whom notice of dishonour is not given, is discharged not only from his liability on the bill, but also from

[1] Cf. *Woodcock* v. *Houldsworth* (1846), 16 M. & W. 124.
[2] S. 50 (1).
[3] *Castrique* v. *Bernabo* (1844), 6 Q. B. 498.
[4] S. 50 (2).
[5] *Caunt* v. *Thompson* (1849), 7 C. B. 400.
[6] *Per* Rolfe, B., in *Allen* v. *Edmundson* (1848), 2 Exch. at p. 725.

any liability as regards the debt or consideration in respect of which it was given.[1] Failure to give notice will not, however, prejudice the rights of any subsequent holder in due course.[2]

If it "is, or on the face of it purports to be, (i.) both drawn and payable within the British Islands (including the Channel Islands and Isle of Man), or (ii.) drawn within the British Islands upon some person resident therein," it is what is called an "inland bill"; otherwise it is a "foreign" bill. Unless the contrary appear, the holder may treat it as an inland bill.[3]

Foreign bills are usually drawn in parts—three or even more—which circulate together, or of which one or more parts may be circulated whilst another is forwarded for acceptance. Each part, however, should specify or refer to the other parts of the set, and express that payment of it is conditional on the other parts of like "tenor and date" as itself remaining unpaid at maturity.[4]

Where a bill of exchange drawn in one country is payable in another, its validity in respect of its form is determined by the law of the place of issue. An acceptance, or other subsequent contract, is governed by the law of the place where such contract is made. The duties of the holder in respect of presentment, protest, notice of dishonour, &c., are governed by the law of the place where those proceedings occur.[5]

## *Cheques.*

"A cheque is a bill of exchange drawn on a banker payable on demand."[6] It needs no acceptance. The bank (the drawee) does not "accept" it, but pays it on presentment: no days of grace are allowed. Cheques are not made for circulation; they should be presented within a reasonable time. The question what is a reasonable time is determined by the circumstances of the case, the nature of the cheque, and by the usage of trade and of bankers.[7]

A cheque may, nevertheless, be presented for payment up to the moment at which it becomes barred by the Statute of

[1] *Peacock* v. *Pursell* (1863), 14 C. B. N. S. 728.
[2] S. 48.
[3] S. 4.
[4] As to bills drawn in a set, see s. 71.
[5] See s. 72 (1), (2), and (3).
[6] S. 73.
[7] S. 74 (2); see *ante*, p. 818.

Limitations,[1] and, unless the bank has meanwhile failed, the drawer is not discharged by the holder's neglect to present it in due time.

The drawer or any holder of a cheque may "cross" it generally, by drawing across the face of it two parallel transverse lines, with or without the words "& Co." To cross a cheque specially, the name of a bank is added between the two lines. A general crossing directs the bank on whom the cheque is drawn to pay it only to a bank, a special crossing to pay it only to the bank specified. The banker on whom a crossed cheque is drawn is liable to the true owner if the cheque is not paid as directed and if loss results.[2] The words "not negotiable" may also be added as part of the crossing, and then no one who takes the cheque can have, or can give, a better title than the person had from whom he took it.[3]

The crossing of a cheque is a material part of it, and must therefore not be obliterated, added to or altered.[4]

In relation to all money deposited generally in a bank, the bank is the debtor of its customer, and must pay his cheques, if it has sufficient funds in hand.[5] It will be liable to an action at the suit of any customer whose cheques it has improperly dishonoured—and this without proof of any special damage.[6] It was formerly said that a bank was allowed a reasonable time in which to satisfy itself that the signature to a cheque was genuine ;[7] it is doubtful whether this is still the law.[8]

A bank must bear the loss itself, if it pays a forged cheque, or a cheque fraudulently altered, unless in the latter case the fraud was assisted by the culpable negligence of the drawer.[9] But it has been held that if a customer so draws a cheque as to leave spaces which assist fraudulent alteration, this is not in itself a breach of the duty owed to the banker.[10]

[1] See *In re Bethell* (1887), 34 Ch. D. 561.

[2] See ss. 76—82, and the Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. VII. c. 17).

[3] S. 81 ; and see the remarks of Lord Brampton in *G. W. Ry. Co.* v. *London and County Bank*, [1901] A. C. at p. 422.

[4] S. 78.

[5] See *In re Derbyshire*, [1906] 1 Ch. 135.

[6] See *Fleming* v. *Bank of New Zealand*, [1900] A. C. 577.

[7] See *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415 ; *Robarts* v. *Tucker* (1851), 16 Q. B. 560.

[8] See the remarks of Lord Macnaghten in *Bank of England* v. *Vagliano Brothers*, [1891] A. C. at p. 157, as to bankers paying their customers' acceptances off-hand.

[9] Compare *Young* v. *Grote* (1827), 4 Bing. 253, with *Hall* v. *Fuller* (1826), 5 B. & C. 750.

[10] *Colonial Bank of Australasia* v. *Marshall*, [1906] A. C. 559.

The authority of a bank to pay a customer's cheques is determined by notice of his death. Consequently a gift *mortis causâ* by cheque is void, unless the cheque be cashed or presented for payment before the donor's death,[1] or negotiated for value to a third person;[2] but such a gift of another person's cheque would not be void.[3] The bank's authority to pay cheques is also determined by countermand of payment ("stopping the cheque") or if a receiving order is made against the customer.[4]

## *Promissory Notes.*

"A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, or at a fixed or determinable future time, a sum certain in money to, or to the order of, a specified person, or to bearer."[5]

The ordinary form of a promissory note is as follows:—

£100. London, 1st January, 1910.

[Three] months after date [*or* On demand, *or* At sight *or* At [ten] days after sight], I promise to pay C. D. or order [*or* bearer] One Hundred Pounds. A. B.

A. B., the person signing the instrument, is called the maker; C. D., the person to whom it is made payable, the payee. If the note is transferred by indorsement, the immediate parties to such transfer are, as in the case of a bill, termed the indorser and indorsee. There may be more than one maker of a note. If so, the makers will be jointly, or jointly and severally, liable according to its tenor. A note running "I promise to pay," signed by two or more persons, is deemed to be their joint and several note.[6]

In a bill of exchange there are usually three original parties, the drawer, the payee, and the drawee, who, after acceptance, becomes the acceptor. In a promissory note there are but two original parties, the maker and the payee. In a bill of exchange the acceptor is, in contemplation of law, the primary debtor to the payee, and the drawer is but collaterally liable. In a promissory note the maker is, in contemplation of law, the primary

[1] *In re Beaumont*, [1902] 1 Ch. 889.
[2] *Rolls* v. *Pearce* (1877), 5 Ch. D. 730.
[3] *Clement* v. *Cheesman* (1884), 27 Ch. D. 631.
[4] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 9, 49. As to the effect of a garnishee order, see *Rogers* v. *Whiteley*, [1892] A. C. 118.
[5] S. 83 (1).
[6] S. 85 (1) and (2).

debtor. When a negotiable note has been indorsed by the payee, there is a striking resemblance in the relations of the parties upon both instruments, although they are not in all respects identical. The first indorser of a note stands in the same relation to the subsequent parties to it as the drawer of an accepted bill payable to drawer's order. The maker of the note is under the same liabilities as the acceptor of a bill.[1] The rules as to the rights and liabilities of parties to inland bills will therefore determine the mutual obligations of the parties to promissory notes. As a note is like an accepted bill, the provisions for presentment and acceptance do not apply. A "note is inchoate and incomplete until delivery thereof to the payee or bearer." [2]

No particular form of words is necessary to constitute a promissory note. "An instrument in the form of a note payable to maker's order is not a note within the meaning of the Act, unless and until it is indorsed by the maker." [3] Where an instrument is so framed as to cause doubt whether it is a bill of exchange or a promissory note, the holder will at his election be entitled to treat it as either;[4] the man who drafted the document is answerable for the ambiguity of his language.[5] If the note contains a promise to do anything else besides pay money, it is not a promissory note within the meaning of the Act.[6] But "a note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof." [7]

A note, however, must be unconditional. If its terms allow time to be given to sureties, it is not a promissory note. But a joint promise is not the less a promissory note if its terms express "that no time given to, or security taken from, or composition or arrangement entered into with, either party" shall prejudice the rights of the holder as against any other party.[8]

"The maker of a promissory note, by making it, engages that he will pay it according to its tenor and is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse." [9] "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that

[1] S. 89.
[2] S. 84.
[3] S. 83 (2).
[4] See s. 5 (2).
[5] See *Peto* v. *Reynolds* (1854), 9 Exch. 410.
[6] See *Mortgage Corporation* v. *Commissioners of Inland Revenue* (1888), 21 Q. B. D. 352; *British India Steam Co.* v. *Commissioners, &c.* (1881), 7 Q. B. D. 165 (a debenture); *Speyer* v. *Commissioners, &c.*, [1907] 1 K. B. 246; affirmed [1908] A. C. 92 (marketable securities).
[7] S. 83 (3).
[8] *Kirkwood* v. *Carroll*, [1903] 1 K. B. 531, overruling *Kirkwood* v. *Smith*, [1896] 1 Q. B. 582.
[9] S. 88; and see *Bank of Montreal* v. *Exhibit and Trading Co.* (1906), 22 Times L. R. 722.

place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable."[1]

Demand or presentment is not, under ordinary circumstances, necessary as against the maker of a note. A promissory note, even when payable on demand, is a present debt, and is payable without any demand. Accordingly the Statute of Limitations will begin to run from the date of such a note; the case is similar to that of money lent, repayable on request—where no demand or request is necessary before bringing the action, because the debt which constitutes the cause of action arises instantly on the loan being made.

The indorser of a promissory note is regarded merely as a surety for the party primarily liable upon the note; he can only be charged when presentment to the maker has been made and due notice of dishonour has been given. The fact that the holder has reason to believe that the note on presentment will be dishonoured (*e.g.*, because the maker is bankrupt or has declared that he will not pay it), will not dispense with the necessity for its presentment.[2] "Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only," the indorser will be rendered liable either by presentment to the maker there or elsewhere, if sufficient in other respects.[3]

"Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged. In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case."[4] If in such a case the note is negotiated, "it is not deemed to be

[1] S. 87 (1).
[2] S. 46 (2).
[3] S. 87 (3).
[4] S. 86 (1) and (2).

overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue."[1]

Bills of exchange and promissory notes (other than bank notes) must be stamped according to the statutory scale of duties in force.[2]

### *Bank Notes.*

A bank note is a promissory note made by a banker, payable to bearer on demand.

Such banks as in 1844 lawfully issued their own notes and have since continued the issue may still do so.[3] Their number, through amalgamations and other causes, is decreasing. Apart from them, the Bank of England enjoys a monopoly of issuing notes. For all sums of five pounds or more the notes of the Bank of England constitute legal tender, except by the Bank itself or its branches;[4] notes of other banks are legal tender, unless objected to when tendered.[5] Bank notes are universally treated as cash, and are paid and received as such. A *bonâ fide* holder of a bank note for value is entitled to retain it as against a former owner from whom it has been stolen.[6] The *bonâ fide* holder for value without notice of any defect in title may recover upon a bank note, although he may at the time have had the means of knowing that the party from whom he received the note had no title, and although he neglected to avail himself of such means.[7] But if, when the circumstances are suspicious, he deliberately refuses to inquire, this may be evidence of bad faith.[8] If a note be

[1] S. 86 (3). See *Glasscock* v. *Balls* (1889), 24 Q. B. D. 13.
[2] See 33 & 34 Vict. c. 97, s. 55.
[3] See Bank Charter Act, 1844 (7 & 8 Vict. c. 32), ss. 10, 12.
[4] See Bank of England Act, 1833 (3 & 4 Will. IV. c. 98), s. 6; 8 & 9 Vict. c. 37, s. 6, and c. 38, s. 15.
[5] *Polglass* v. *Oliver* (1831), 2 Cr. & J. 15.
[6] See *Miller* v. *Race* (1758), 1 Smith, L. C., 11th ed., 463.
[7] *Raphael* v. *Bank of England* (1855), 17 C. B. 161; and see Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 90.
[8] *Jones* v. *Gordon* (1877), 2 App. Cas. 616.

stopped, the bank may delay payment while it makes the necessary inquiries.[1]

A Bank of England note is avoided if it be altered in any material particular, for example, in its amount or in its date or number. The payee of a note thus avoided, or of a note entirely forged, can recover the money or other value which formed the consideration for the note, for the payment was made under a mistake of fact and without consideration.[2]

### *Defences.*

There are at common law several defences open to a defendant who is sued upon a bill of exchange or promissory note. We propose to deal especially with the following:—

(i.) Absence or illegality of consideration.
(ii.) Payment.
(iii.) Loss of the instrument.
(iv.) Material alteration.
(v.) Other facts which operate as a discharge.

(i.) A bill or note *primâ facie* imports consideration; and "every party whose signature appears on a bill is, *primâ facie*, deemed to have become a party thereto for value."[3] It is, however, open to the defendant to rebut this presumption. Thus, he may prove that either the bill itself or the acceptance of it was obtained without consideration or by fraud, duress, or other unlawful means, *e.g.*, that the consideration was illegal, or that the bill had been negotiated in breach of faith or under such circumstances as amount to fraud. In all these cases the holder's title is defective.[4]

The *onus* of proving absence of consideration lies in the first instance upon the party asserting it. If, however, "in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected by fraud, duress or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has been given for the bill, and given in good faith."[5] The defence

[1] *Solomons* v. *Bank of England* (1791), 13 East, 135.
[2] *Jones* v. *Ryde* (1814), 5 Taunt. 488.
[3] S. 30 (1).
[4] S. 29 (2); and *ante*, pp. 809, 810.
[5] S. 30 (2); and see *Tatam* v. *Haslar* (1889), 23 Q. B. D. 345.

of "no consideration" as to part only of a bill or note is a defence *pro tanto* as against an immediate party, though not against a remote party who is a holder in due course. For instance, by way of answer to an action upon such instrument, a man might say that in adding up an account he erroneously supposed himself to be indebted to the plaintiff in £100, whereas in truth £10 only was due. That in the case of a bill or note would be a good defence except as to £10. A partial failure of consideration would not, however, avail as a defence, if the bill or note had passed into the hands of a stranger.

(ii.) Payment of a bill discharges the drawee or acceptor if made in due course, either by him or on his behalf. It must be "made at or after the maturity of the bill to the holder thereof, in good faith, and without notice that his title to the bill is defective."[1] "A thing is deemed to be done in good faith, within the meaning of the Act, where it is in fact done honestly, whether it is done negligently or not."[2]

A bill is not discharged by payment by the drawer or an indorser. But if the drawer pay a bill payable to or to the order of a third party, he can enforce payment of it against the acceptor: he cannot, however, re-issue the bill. Further, "where a bill is paid by an indorser, or where a bill payable to the drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or any antecedent parties, and he may, if he thinks fit, strike out his own and any subsequent indorsements, and again negotiate the bill."[3]

"Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged."[4]

(iii.) Where a bill of exchange has been lost before falling due and not afterwards recovered, the question whether or not a remedy upon the instrument can be enforced at common law will depend upon the nature of the bill and the form in which the defence is presented.[5] If the bill be originally negotiable, *i.e.*, payable "to C. D." or "C. D. or order," or "to bearer," at common law the acceptor is not bound to pay the bill to any one suing as holder who refuses or is unable to deliver up the bill.[6]

[1] S. 59 (1).
[2] S. 90.
[3] S. 59 (2).
[4] S. 59 (3).
[5] *King* v. *Zimmerman* (1871), L. R. 6 C. P. 466.
[6] *Hansard* v. *Robinson* (1827), 7 B. & C. 90; *Ramuz* v. *Crowe* (1847), 1 Exch. 167.

By the custom of merchants "the holder of the bill shall present the instrument at its maturity to the acceptor, demand payment of its amount, and, upon receipt of the money, deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer."[1] The rule is the same under the statute, which provides that "where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it."[2] The loss of a negotiable bill, given on account of a debt, has been held to be an answer to an action for the debt as well as to one on the bill.[3] Apparently an action will lie where a bill is proved to have been destroyed.[4] The defence of loss could not be pleaded in the case of a non-negotiable instrument.[5]

It is provided by the Act that "where a bill has been lost before it is overdue, the holder may apply to the drawer to give him another bill of the same tenor, giving security, if required, to indemnify the drawer" against all claims on the bill so lost; in case of refusal he can compel the drawer to give such duplicate bill. Further, "in any action or proceeding upon a bill, the Court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question."[6] Protest may be made on a copy of a bill lost or destroyed.[7] A loss or destruction does not excuse the giving of notice of dishonour.[8]

(iv.) "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party, who has himself made, authorised or assented to the alteration, and subsequent indorsers."[9] This will be so whether the alteration is made by the holder himself or by a stranger; for "no man shall be permitted to take the chance of committing a fraud without

[1] *Per cur.* in *Hansard* v. *Robinson* (1827), 7 B. & C. at p. 94.
[2] S. 52 (4).
[3] *Crowe* v. *Clay* (1854), 9 Exch. 604.
[4] *Wright* v. *Maidstone* (1855), 24 L. J. Ch. 623.
[5] *Wain* v. *Bailey* (1839), 10 A. & E. 616.
[6] Ss. 69, 70.
[7] S. 51 (8).
[8] *Thackray* v. *Blackett* (1812), 3 Camp. 164.
[9] S. 64 (1), *ante*, pp. 755, 756; and see the notes to *Master* v. *Miller* (1793), 1 Smith L. C., 11th ed., 767.

running any risk of losing by the event when it is detected."[1] And again, "a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state." If he omits to do so, and thus loses his remedy, he "has no right to complain, since there cannot be any alteration except through fraud or laches on his part."[2]

The following alterations, in particular, are declared material by the Act: "any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."[3] And it has also been held that the alteration of the number of a bank note,[4] and the addition of a maker to a joint and several note,[5] are material alterations.

An immaterial alteration will not, however, affect the validity of an instrument.[6] And it is further provided by the Act, in mitigation of the previous rigour of the law, that "where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor."[7]

(v.) A bill will also be discharged in the following cases:—

(a) If the acceptor is or becomes the holder of it, at or after maturity, in his own right.[8]

(b) If the holder, at or after maturity, absolutely and unconditionally renounces his rights against the acceptor. Such renunciation, however, in order to operate as a discharge, must be made in writing, unless the bill is delivered up to the acceptor.[9] Similarly

[1] *Per* Lord Kenyon, C. J., in *Master* v. *Miller* (1793), 1 Smith L.C., 11th ed., at p. 777.
[2] *Per cur.* in *Davidson* v. *Cooper* (1844), 13 M. & W. at p. 352.
[3] S. 64 (2).
[4] *Suffell* v. *Bank of England* (1882), 9 Q. B. D. 555; *Leeds and County Bank* v. *Walker* (1883), 11 Q. B. D. 84; and see *ante*, p. 827.
[5] *Gardner* v. *Walsh* (1855), 5 E. & B. 83.
[6] *Aldous* v. *Cornwell* (1868), L. R. 3 Q. B. 573.
[7] S. 64 (1).
[8] S. 61.
[9] See *In re George, Francis* v. *Bruce* (1890), 44 Ch. D. 627; *Edwards* v. *Walters*, [1896] 2 Ch. 157.

a contemporaneous agreement for renewal must be in writing, otherwise it is inadmissible as evidence, for it contradicts a written document.[1] The holder may renounce his rights against any party to the bill before, at or after maturity; but it is provided that this shall not affect the rights of a holder in due course, without notice of the renunciation.[2] The holder of a bill may agree with the acceptor not to enforce his remedies against him, and may at the same time reserve his rights against those who are liable in the second degree, so that the latter will not be discharged.[3]

(c) An intentional cancellation by the holder or his agent, if apparent on the bill, will discharge it. Such cancellation may be so applied to the signature of any party to the bill, and will then discharge all parties to whom the party whose signature is so cancelled would have been liable. An unintentional, mistaken or unauthorised cancellation is inoperative, but the *onus* of proof will lie upon the person who alleges such want of intention or authority.[4]

The rules as to capacity to incur liability on bills and notes are the same as those which govern other contracts.[5] Though an infant cannot make a valid acceptance even for necessaries, he may be successfully sued on the consideration.[6] A corporation has power to contract by bill where, upon a fair construction of its memorandum and articles or other instrument under which it is constituted, it appears that such power was intended to be given.[7]

### *Other Negotiable Instruments.*

In addition to the examples of negotiable instruments already discussed, there are many others which are recognised

[1] *New London Credit Syndicate* v. *Neale*, [1898] 2 Q. B. 487.
[2] S. 62.
[3] *Muir* v. *Crawford* (1875), L. R. 2 H. L. Sc. 456; and see *Bateson* v. *Gosling* (1871), L. R. 7 C. P. 9.
[4] S. 63.
[5] S. 22 (1).
[6] *In re Soltykoff*, [1891] 1 Q. B. 413.
[7] *Peruvian Ry. Co.* v. *Thames Insurance Co.* (1867), L. R. 2 Ch. 617; and see 8 Edw. VII. c. 69, s. 77.

in our Courts of law. Thus, bankers' circular notes (unless restrictively indorsed),[1] India bonds,[2] and Exchequer bills in blank;[3] foreign or colonial Government bonds,[4] stock,[5] and scrip[6] payable to bearer; American railway bonds payable to bearer[7] and debentures payable to bearer[8]—all these have been held to be negotiable instruments. So also the share warrants to bearer issued by an English company registered under the Companies Acts, 1867—1908, certifying that "the bearer is entitled to one share of £——, which is fully paid up, numbered —— in the company."[9]

It was formerly thought that no English instruments, outside those already recognised by the Courts as negotiable, could become negotiable by custom.[10] In *Bechuanaland Exploration Co.* v. *London Trading Bank*,[11] the bearer debentures of an English company were held negotiable, there being "sufficient proof of a mercantile usage to treat the debentures in question in this case as negotiable." In *Edelstein* v. *Schuler & Co.*,[12] Bigham, J., considered it was "no longer necessary to tender evidence in support of the fact that such bonds are negotiable." Apparently, therefore, such debentures are now judicially recognised as negotiable.

Foreign instruments may become negotiable in England by custom. The instrument must not be expressed in any way which would negative negotiability.[13] It is important to show, not that the instrument is negotiable in the country of its origin,[14] but that it is transferable by delivery, and

[1] *Conflans Quarry Co.* v. *Parker* (1867), L. R. 3 C. P. 1.
[2] See 51 Geo. III. c. 64, s. 4.
[3] *Brandao* v. *Barnett* (1846), 12 Cl. & F. 787.
[4] *Symons* v. *Mulkern* (1882), 30 W. R. 875.
[5] *Gorgier* v. *Mieville* (1824), 3 B. & C. 45.
[6] *Goodwin* v. *Robarts* (1875), 1 App. Cas. 476; *London and County Bank* v. *London and River Plate Bank* (1888), 21 Q. B. D. 535; *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 120.
[7] *Venables* v. *Baring*, [1892] 3 Ch. 527.
[8] *Edelstein* v. *Schuler & Co.*, [1902] 2 K. B. 144.
[9] *Webb, Hale & Co.* v. *Alexandria Water Co., Ltd.* (1905), 93 L. T. 339.
[10] See *Crouch* v. *Crédit Foncier* (1873), L. R. 8 Q. B. 374, now treated as overruled by the following cases.
[11] [1898] 2 Q. B. 658, 678, following *Goodwin* v. *Robarts* (1875), 1 App. Cas. 476, and *Rumball* v. *Metropolitan Bank* (1877), 2 Q. B. D. 194.
[12] [1902] 2 K. B. at pp. 155, 156.
[13] *Colonial Bank* v. *Hepworth* (1887), 36 Ch. D. 36.
[14] *Venables* v. *Baring*, [1892] 3 Ch. 527.

further that it passes free from defects in the title of the transferor.[1]

The parties to an instrument which is otherwise not negotiable cannot make it negotiable by contracting to that effect;[2] but they might be estopped from denying what they had agreed.[3]

Instances of instruments which the Courts have refused to recognise as negotiable are bills of lading,[4] postal orders not signed by the payee,[5] American railway share certificates with blank power of transfer,[6] share certificates with blank indorsement,[7] and Prussian Consolidated Bonds.[8]

Iron warrants (*i.e.*, written promises to deliver so many thousand tons of iron to bearer) are not negotiable;[9] but they may be made assignable free from equities.[10]

[1] See *Simmons* v. *London Joint Stock Bank*, [1891] 1 Ch. at p. 294.
[2] *Dixon* v. *Bovill* (1856), 3 Macq. H. L. C. 1.
[3] See *Goodwin* v. *Roberts* (1875), 1 App. Cas. 476.
[4] See *Lickbarrow* v. *Mason* (1787), 1 Smith, L. C., 11th ed., 711.
[5] *Fine Art Society* v. *Union Bank of London* (1886), 17 Q. B. D. 705.
[6] *London and County Bank* v. *London and River Plate Bank* (1888), 21 Q. B. D. 535.
[7] *Colonial Bank* v. *Cady* (1890), 15 App. Cas. 267.
[8] *Picker* v. *London and County Bank* (1887), 18 Q. B. D. 515.
[9] *Dixon* v. *Bovill* (1856), 3 Macq. H. L. C. 1.
[10] *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.* (1877), 5 Ch. D. 205.

## Chapter XI.

### PRINCIPAL AND AGENT : PARTNERSHIP.

When one person gives another authority to act in his name or on his behalf in such manner as to bring him into legal relations with a third party, the former is called a principal, the latter an agent, and the contract between them is a contract of agency. "The relation of principal and agent requires the consent of both parties. There must be an express or implied assent to, or a subsequent ratification of, that relation." [1]

With some few exceptions, it may be said that whatever a man may lawfully do by himself, he may do by another. But there are certain confidential or personal duties which cannot be delegated to an agent. Thus, if a man is engaged to perform duties which involve the exercise of artistic skill or of taste or discretion (*e.g.*, to write a book, or to act or sing at a theatre), he cannot hand such duties over to a deputy without the consent of his employer.[2] So a special power of appointment cannot be delegated ; [3] nor can consent to the execution of a power of appointment be given by an agent.[4] Again, persons who are wholly or partially incapable of contracting are in like measure incapable of contracting by agent. It by no means follows, however, that a person incapable of contracting on his own behalf is incapacitated from acting as agent for another. An infant may in many cases act as agent for an adult, and (apart from special legislation on this subject) a married woman may act as the agent of her husband.

[1] *Per cur.* in *Markwick* v. *Hardingham* (1880), 15 Ch. D. at pp. 349, 350.
[2] *L. C. C.* v. *Hobbis* (1897), 75 L. T. 687 ; and see *Combes's Case* (1613), 9 Rep. 76 a.
[3] *Topham* v. *Duke of Portland* (1863), 32 L. J. Ch. 257.
[4] *Hawkins* v. *Kemp* (1803), 3 East, 410.

A contract of agency arises, like other contracts, by mutual agreement. But in certain cases of so-called "agency of necessity" a *quasi*-relationship of principal and agent is created by operation of law—for example, a ship-master, or the acceptor of a bill of exchange for the honour of the drawer, may act as agent by reason of necessity.[1] An agent of necessity is one who, in a special emergency, without express authority or the opportunity of obtaining it, is entitled to incur additional expense in the protection of his principal's interests, and thereby to bind his principal to the necessary extent.

The agreement forming the contract of agency may be either express or implied. If the agent is to execute a deed,[2] he must be appointed under seal by a formal instrument sometimes called a power of attorney. If a corporation appoints an agent, it must—as we have seen[3]—in some cases make the appointment formally by seal. But, apart from these instances, no formality is necessary to a contract of agency. An agent may be appointed verbally, even when he is appointed for the purpose of signing contracts in writing to satisfy the Statute of Frauds and Sale of Goods Act, 1893.[4]

Further, agency may be inferred from the relationship of the parties. For instance, in partnership one partner is at common law the agent of the firm for all purposes necessary for carrying on their particular partnership.[5] And a married woman may be the express or implied agent of her husband. A woman living with a man as his mistress has the same implied authority to act as his agent in purchasing necessaries as she would have if she were his wife. By living with her, the man holds her out as his agent, and if third parties act upon the faith of such holding out, the man is estopped from denying the agency. Wherever it is found as a fact that one person by his conduct holds out another as his agent, he will not be allowed to deny the agency as against anyone who deals with the apparent agent upon the faith of such holding out.[6]

[1] See the remarks of Lord Esher, M. R., in *Gwilliam* v. *Twist*, [1895] 2 Q. B. at p. 87; and *G. N. Ry. Co.* v. *Swaffield* (1874), L. R. 9 Ex. 132.

[2] Except when he is merely executing a deed in the name and by the authority of a principal, who is actually present: *Harrison* v. *Jackson* (1797), 7 T. R. 207.

[3] See *ante*, pp. 664—666, and *post*, Book VI., Law of Persons, Chap. VI.

[4] 29 Car. II. c. 3; 56 & 57 Vict. c. 71; and see *Heard* v. *Pilley* (1869), L. R. 4 Ch. 548.

[5] See, further, *post*, p. 848.

[6] *Pickering* v. *Busk* (1812), 15 East, 38; and see the remarks of Bramwell, B., in *Cornish* v. *Abington* (1859), 4 H. & N. at p. 556.

Thus, persons who act ostensibly as directors of a company, even if they are not yet duly and fully appointed directors, are agents of the company, and their transactions on behalf of the company with others, who have dealt with them *bonâ fide* without notice of the irregularity in the appointment, will bind the company.[1] So, where the true owner of certain property held out A. as its owner, he was held to be estopped from setting up his own title against a third person, to whom A. had sold the property and who had taken it *bonâ fide* for value.[2] "The doctrine of estoppel is that the person estopped is precluded from denying, in the same transaction as that in which the estoppel arises, the truth of the statement acted on."[3]

Again, a person who appears on the face of a written contract to have contracted as a principal, cannot, in order to avoid liability as principal, show by extrinsic evidence that he contracted as an agent;[4] nor can he show that a contract, signed by him expressly as a principal, was made by him as an agent for a party to the action.[5]

A contract of agency may also be created by ratification. Where A. purports to act as agent for P., either having no authority at all or having no authority to do that particular act, the subsequent adoption by P. of A.'s act has the same legal consequences as if P. had originally authorised the act.

But there can be no ratification, unless A. purported to act as agent,[6] and to act for P.; and in such a case P. alone can ratify.[7] Nor can there be any binding ratification of an agreement which was originally void.

If A. contracts in his own name, hoping that P. will ratify the contract, and if A. does not disclose the position to the other contracting party, P. cannot ratify so as to sue upon the contract.[8] A company cannot ratify a contract made by promoters before the company was incorporated; for there was no existing principal at the time of the contract.[9] If, however, when the contract is made, there exists someone capable of subsequently

[1] See *Biggerstaff* v. *Rowatt's Wharf, Ltd.*, [1896] 2 Ch. 93.

[2] *Rimmer* v. *Webster*, [1902] 2 Ch. 163; and see the remarks of Farwell, L. J., in *Burgis* v. *Constantine*, [1908] 2 K. B. at p. 503.

[3] *Per* Channell, J., in *Compania Naviera Vasconzada* v. *Churchill and Sim*, [1906] 1 K. B. at p. 251.

[4] *Higgins* v. *Senior* (1841), 8 M. & W. 834.

[5] *Humble* v. *Hunter* (1848), 12 Q. B. 310, followed in *Formby Bros.* v. *E. Formby*, [1910] W. N. 48.

[6] *Woollen* v. *Wright* (1862), 1 H. & C. 554. See *In re Tiedemann and Ledermann Frères*, [1899] 2 Q. B. 66.

[7] See *Heath* v. *Chilton* (1844), 12 M. & W. 632.

[8] *Keighley, Maxsted & Co.* v. *Durant*, [1901] A. C. 240.

[9] *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174; *Natal Land, &c., Co.* v. *Pauline Colliery Syndicate*, [1904] A. C. 120. There is nothing to prevent the company making a contract in identical terms after formation: *Howard* v. *Patent Ivory Co.* (1888), 38 Ch. D. 156.

ratifying it, it does not matter that his identity should be unascertained by the agent at the time of the contract. For instance, an insurance policy can be taken out on behalf of an unascertained heir who might afterwards ratify the contract.[1]

If an agreement is beyond the powers of a limited company and therefore void, the company cannot adopt and ratify it.[2] A man cannot adopt an act for which he might be indicted. Probably a man cannot ratify a contract to which his signature has been forged.[3] The ratification of an "unauthorised signature not amounting to a forgery" is excepted from section 24 of the Bills of Exchange Act, 1882,[4] whereby a forged or unauthorised signature to a bill is made wholly inoperative.

Ratification must go to the whole of the contract. A man cannot accept the beneficial part and reject the rest.[5] He may ratify a contract though he at first repudiated it as not made with his authority;[6] but ratification, once it is made, cannot be retracted. It must be made with full knowledge of the facts of the case:[7] it is not valid if induced by the misstatements of a third party, even if they were innocently made.[8] If one man pays another's creditors for him, the debtor may ratify his friend's act. But the creditors may, if they like, return the money so paid; and in that case the debtor cannot ratify or profit by the payment.[9]

Ratification of a contract relates back to the time of the original contract. A principal has been allowed to ratify an insurance contract after loss and even with knowledge of the loss;[10] he has further been allowed to ratify an offer accepted on his behalf which to his knowledge has since been withdrawn.[11] In general, ratification must be made within a reasonable time: a man cannot bind the other party to the

[1] *Hagedorn* v. *Oliverson* (1814), 2 M. & S. 485; and see *Lyell* v. *Kennedy* (1889), 14 App. Cas. 437.

[2] See *Ashbury Carriage Co.* v. *Riche* (1875), L. R. 7 H. L. 653.

[3] *Brook* v. *Hook* (1871), L. R. 6 Ex. 89; but see the remarks of Lord Blackburn in *M'Kenzie* v. *British Linen Co.* (1881), 6 App. Cas. at p. 99.

[4] 45 & 46 Vict. c. 61.

[5] See *Bristow* v. *Whitmore* (1861), 9 H. L. Cas. 391.

[6] See *Soames* v. *Spencer* (1822), 1 Dowl. & R. 32; *Simpson* v. *Eggington* (1855), 10 Exch. 845.

[7] *Marsh* v. *Joseph*, [1897] 1 Ch. 213; see *Bancroft* v. *Heath* (1900), 5 Com. Cas. 110.

[8] See *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K. B. 516.

[9] *Walter* v. *James* (1871), L. R. 6 Ex. 124.

[10] See *Williams* v. *North China Insurance Co.* (1876), 1 C. P. D. 757.

[11] *Bolton* v. *Lambert* (1888), 41 Ch. D. 295; *In re Tiedemann and Ledermann Frères*, [1899] 2 Q. B. 66. But these decisions are not wholly authoritative: see *Fleming* v. *Bank of New Zealand*, [1900] A. C. at p. 587.

contract by a ratification made after the time has arrived for performance.[1] If a thing must be done by a certain time or not at all, ratification cannot take place after that time. Nor can ratification prejudice the rights of third parties;[2] it cannot operate so as to divest an estate once vested.[3]

Thus, if a landlord must give notice to quit within a certain time, he will not be allowed to ratify after that time an unauthorised notice previously given on his behalf.[4] So also, where X. and Y., partners, agreed that the survivor of them should have an option of buying the dead man's share, if notice were given to the deceased's executors within a certain time after death, it was held that an unauthorised notice given within the time could not be ratified after the time had expired.[5]

Mere non-intervention is not ratification: there must be words or conduct which make it clear that the principal intends to ratify. Subject to this qualification, ratification may be either express or implied, except that ratification of the execution of a deed must itself be by deed.[6]

An agent's authority cannot exceed the powers of his principal; in other words, an agent cannot do that which his principal could not do.[7] The authority may be conferred and defined by words written or spoken, or by inference from the course of dealing between the parties. If the authority is so ambiguously expressed that two courses of action are open to the agent, and the agent in good faith acts in one way though the principal intended him to act in the other, the principal will be bound by the agent's act.[8] In carrying out that which he is authorised to do, an agent has implied authority to do whatever may be ordinarily necessary for or properly incidental to the purpose. Thus, notice to an agent of any fact material to the transaction in which he is employed as agent is notice to the principal. But the knowledge of or notice to a man who is not employed in the transaction is

[1] *Metropolitan Asylums Board* v. *Kingham* (1890), 6 Times L. R. 217.
[2] *Donelly* v. *Popham* (1807), 1 Taunt. 1.
[3] See *Lyell* v. *Kennedy* (1889), 14 App. Cas. at p. 462.
[4] *Doe* d. *Mann* v. *Walters* (1830), 10 B. & C. 626.
[5] *Dibbins* v. *Dibbins*, [1896] 2 Ch. 348.
[6] *Mayor of Oxford* v. *Crow*, [1893] 3 Ch. 535.
[7] *Poulton* v. *L. & S. W. Ry. Co.* (1867), L. R. 2 Q. B. 534.
[8] *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395, 416.

immaterial, although he may be acting as agent for the same principal in some other transaction.[1]

With regard to the extent of their authority, agents may be divided into two classes, general and special. A general agent has implied authority from his principal to do everything that general agents usually do in that class of business. But the authority of a particular agent is confined to the particular business which he is employed to do, and is restricted by any instructions which he may have received from his principal as to the conduct of that particular business. Thus a gentleman's groom, who is sent to sell his horse at a fair, has no implied authority to warrant the horse sound. But the groom of a horsedealer would have such authority, because grooms of horsedealers are general agents, and usually do warrant their masters' horses to be sound.[2]

An agent, authorised to take payments of money, has no authority (unless it be customary in that particular business) to accept anything instead of cash—for example, a cheque [3] or bill of exchange.[4] An agent authorised to receive payment for goods in a shop is not necessarily authorised to receive payment elsewhere.

The authority of an agent to pay his principal's debt implies authority to promise to pay it.[5] An agent, acting as manager of a beer-house, may order cigars for sale therein.[6] An agent, acting as manager of a ship, may pledge the owners' credit for repairs.[7] A hospital matron may pledge the credit of the committee of management for meat for the hospital.[8] A railway company's general manager may pledge its credit for the cost of medical assistance to one of its servants;[9] but a station-master has no implied authority to do the like for medical assistance to a passenger who is injured in an accident.[10] A coachman, as such, has no implied authority to pledge his master's credit for forage supplied for the horses.[11]

The manager of an estate has implied authority to grant the usual leases (though a steward might not have authority to grant a lease for

[1] *Morrison* v. *Universal Marine Insurance Co.* (1873), L. R. 8 Ex. 197; and see *Blackburn* v. *Vigors* (1887), 12 App. Cas. at pp. 537, 541.

[2] *Howard* v. *Sheward* (1866), L. R. 2 C. P. 148.

[3] See *Pape* v. *Westacott*, [1894] 1 Q. B. 272; *Blumberg* v. *Life, &c., Corporation*, [1897] 1 Ch. 171.

[4] *Hine* v. *Steamship Insurance Syndicate* (1895), 72 L. T. 79.

[5] *In re Hale, Lilley* v. *Foad*, [1899] 2 Ch. 107.

[6] *Watteau* v. *Fenwick*, [1893] 1 Q. B. 346. See *Edmunds* v. *Bushell* (1865), L. R. 1 Q. B. 97.

[7] *The Huntsman*, [1894] P. 214.

[8] *Real and Personal Advance Co.* v. *Phalempin* (1893), 9 Times L. R. 569.

[9] *Walker* v. *G. W. Ry. Co.* (1867), L. R. 2 Ex. 228.

[10] *Cox* v. *Midland Counties Ry. Co.* (1849), 3 Exch. 268.

[11] *Wright* v. *Glyn*, [1902] 1 K. B. 745.

a term of years[1]) and to give and accept notices to quit, which a rent collector could not do.[2] An agent, authorised to sell property for the owner and to accept a commission on the actual purchase price, has implied authority to make a binding contract and sign the same.[3] In general, an agent employed to find a purchaser would not have power to make the contract of sale.[4]

An agent has no authority to give persons into custody, unless he cannot properly carry out his duty otherwise.[5] A bank manager has no such implied authority.[6]

An agent has ordinarily no authority to borrow on the principal's behalf, so as to bind him.[7] But "where money is borrowed on behalf of a principal by an agent, the lender believing that the agent has authority though it turns out that his act has not been authorised, or ratified, or adopted by the principal, then, although the principal cannot be sued at law, yet in equity, to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is entitled to stand in the same position as if the money had originally been borrowed by the principal."[8]

Authority to sell goods did not at common law include authority to pawn them. But by the Factors Act, 1889,[9] where a "mercantile agent" (who is defined as a person "having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods") is, with the consent of the owner, in possession of goods or of the documents of title to goods, then any sale, pledge or other disposition of the goods made by him when acting in the ordinary course of his business (that is, as he would act if duly authorised[10]) is, subject to the provisions of the Act, as valid as if he were expressly authorised so to do by the owner of the goods, provided the person taking the goods acts in good faith, and has no notice that the other is acting without authority. Any such disposition of goods is valid notwithstanding the determination of the consent, unless the person taking the goods has notice that the consent has determined.[11]

A jeweller's assistant employed at a small salary to sell goods retail on commission is not within the definition. "There is no such business as that of an agent to pledge with pawnbrokers for the purpose of raising money for the employer of the agent."[12]

[1] *Collen* v. *Gardner* (1856), 21 Beav. 540.
[2] *Pearse* v. *Boulter* (1860), 2 F. & F. 133.
[3] *Rosenbaum* v. *Belson*, [1900] 2 Ch. 267.
[4] *Chadburn* v. *Moore* (1892), 61 L. J. Ch. 674.
[5] *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516.
[6] *Bank of New South Wales* v. *Owston* (1879), 4 App. Cas. 270.
[7] *Brocklesby* v. *Temperance Permanent Building Society*, [1895] A. C. 173.
[8] *Per* Romer, L. J., in *Bannatyne* v. *MacIver*, [1906] 1 K. B. at p. 109; and see *In re Wrexham, &c., Ry. Co.*, [1899] 1 Ch. 440.
[9] 52 & 53 Vict. c. 45, s. 2; and see *Weiner* v. *Harris*, [1910] 1 K. B. 285.
[10] See *Oppenheimer* v. *Attenborough & Sons*, [1908] 1 K. B. 221.
[11] *Biggs* v. *Evans*, [1894] 1 Q. B. 88.
[12] *Per* Mathew, J., in *Hastings* v. *Pearson*, [1893] 1 Q. B. at p. 64.

Where the contract of agency is such that the principal relies on the agent's skill and discretion or on his personal discharge of the matters to be done, the agent cannot delegate his powers to anyone else, unless the principal expressly or impliedly consents, or unless trade usage permits.[1] Generally, where a sub-agent is appointed, in the absence of a special agreement there is no privity between the principal and the sub-agent;[2] the sub-agent is accountable to the agent, the agent to the principal.

If one man acts as agent for another, he is not necessarily entitled to be rewarded for his services. But generally there is a contract for his remuneration, either express or implied from circumstances which show that it was intended that he should be remunerated at such rate as is customary in the particular kind of business, or at a reasonable rate. Where he works as a solicitor or as an auctioneer, or in any other capacity in which remuneration is usually charged, it will be presumed that he is to be paid at the usual rate. If he is to have no reward, an action will not lie to compel him to give his services; but if he begins the work and is negligent, he will be liable for such negligence, although he is working gratuitously.

If he is to be paid for his services as agent, he is liable for the results of his want of skill and of reasonable diligence. If he is grossly unskilful or negligent or dishonest, or if he fails to keep proper accounts,[3] he may lose his commission. And he must make good to his principal any loss which is the natural consequence of his omission to take proper care, or of any other breach of duty on his part.[4] Where he is employed for a definite period (*e.g.*, as a commercial traveller for five years), there is an implied contract that he shall have a chance to earn his commission during that time; so if the principal's factory is burnt down, he will not be discharged from his

[1] See *De Bussche* v. *Alt* (1877), 8 Ch. D. 286; *Bell* v. *Balls*, [1897] 1 Ch. 663; and the remarks of Lord Esher, M. R., in *Gwilliam* v. *Twist*, [1895] 2 Q. B. at p. 86.

[2] See *Montagu* v. *Forwood*, [1893] 2 Q. B. 350.

[3] *White* v. *Lincoln* (1803), 8 Ves. 363; and see *Hurst* v. *Holding* (1810), 3 Taunt. 32.

[4] See *Salvesen & Co.* v. *Rederi Aktiebolaget Nordstjernan*, [1905] A. C. 302.

contract to employ the agent.[1] If an agent is employed to find a purchaser for certain property, and is to have a fixed commission if successful, he can claim nothing on a *quantum meruit* if he fails.[2] If he finds a purchaser, and the seller will not complete the sale, he can recover,[3] for if the act of his principal prevents him from earning his commission, he can claim damages for breach of the contract of agency.[4] If the principal revokes his agent's authority before he exercises it, and he is not forbidden to do so by the agreement, the terms of the contract and the facts of the case must be examined in order to determine whether the parties intended that the agent should be remunerated for services rendered before revocation.[5]

An agent can recover no commission on any business which is, obviously or to his knowledge, unlawful,[6] for example on an illegal insurance transaction.[7] A promise, express or implied, to pay commission in respect of contracts made null and void by the Gaming Act, 1845, is itself made void by the Gaming Act, 1892.[8]

A principal must make good to his agent all losses or expenses incurred by the agent in the proper execution of his duty,[9] unless they arise over some business which the agent knew was unlawful,[10] or unless they arise by the agent's own fault [11] or out of transactions which are outside the scope of the agency.[12]

An agent may not take any surreptitious profit in the course of his agency.[13] If he does so, it is a fraud upon his principal, who may thereupon repudiate the contract. An agent must act in the interests of his principal, and must

[1] *Turner* v. *Goldsmith*, [1891] 1 Q. B. 544.
[2] See *M'Leod* v. *Artola* (1889), 6 Times L. R. 68; and *ante*, pp. 737—741.
[3] *Prickett* v. *Badger* (1856), 1 C. B. N. S. 296.
[4] *Inchbald* v. *Western Neilgherry Coffee Co.* (1864), 17 C. B. N. S. 733.
[5] See *Noah* v. *Owen* (1886), 2 Times L. R. 364.
[6] *Haines* v. *Busk* (1814), 5 Taunt. 521.
[7] *Allkins* v. *Jupe* (1877), 2 C. P. D. 375.
[8] 55 Vict. c. 9, s. 1; and see *ante*, p. 728.
[9] See *Thacker* v. *Hardy* (1878), 4 Q. B. D. 685; *Johnson* v. *Kearley*, [1908] 2 K. B. 514.
[10] See *Levy* v. *Warburton* (1901), 70 L. J. K. B. 708.
[11] *Ellis* v. *Pond*, [1898] 1 Q. B. 426.
[12] *Coates* v. *Pacey* (1892), 8 Times L. R. 474.
[13] See *Grant* v. *Gold Exploration Syndicate*, [1900] 1 Q. B. 233.

fully disclose his own personal interest. He may not purchase from, or sell to, his principal without the latter's knowledge and consent.[1] Any secret profit received by the agent must be accounted for and paid over to the principal; if it is not, the principal can recover it as money received to his use.[2]

Thus even if an agent advises his principal in good faith, a secret bribe to the agent will avoid the contract.[3] But if the principal knew that his agent usually received money from third persons, and omitted to inquire how much was received, he cannot say this was a secret profit.[4]

A secret profit made by a company director in the conduct of the company's business must similarly be accounted for and given up to the shareholders.[5]

An agent making a secret profit will apparently not be allowed to keep his other remuneration, if he has been dishonest.[6]

Under the Prevention of Corruption Act, 1906,[7] an agent who corruptly accepts any gift or consideration for doing, or forbearing to do, any act in relation to his principal's affairs is guilty of a misdemeanour.

If a contract, induced by bribing an agent, be disadvantageous to the principal, the principal can not only recover the bribe from the agent, but also the amount of his consequential loss either from the agent or from the giver of the bribe.[8]

When a man makes a contract, he may either:—

(a) expressly state that he is agent for P.; or

(b) say that he is agent without mentioning for whom (that is, not "disclosing his principal"); or

(c) contract as principal.

And in each of these three cases, he may be:—

(i.) really agent for P.;

(ii.) really principal;

[1] *Rothschild* v. *Brookman* (1831), 5 E. R. 273; *Robinson* v. *Mollett* (1874), L. R. 7 H. L. 802.

[2] *Powell & Thomas* v. *Evan Jones & Co.*, [1905] 1 K. B. 11; *Nitedals Tuendstikfabrik* v. *Bruster*, [1906] 2 Ch. 671.

[3] *Shipway* v. *Broadwood*, [1899] 1 Q. B. 369; and see *ante*, p. 725.

[4] *Great Western Insurance Co.* v. *Cunliffe* (1869), L. R. 9 Ch. 525; *Baring* v. *Stanton* (1876), 3 Ch. D. 502.

[5] See *Archer's Case*, [1892] 1 Ch. 322.

[6] See *Andrews* v. *Ramsay*, [1903] 1 K. B. 635; *Hippisley* v. *Knee Bros.*, [1905] 1 K. B. 1; and *Nitedals Tuendstikfabrik* v. *Bruster*, *supra*.

[7] 6 Edw. VII. c. 34, *ante*, pp. 356, 357.

[8] *Mayor of Salford* v. *Lever*, [1891] 1 Q. B. 168.

(iii.) he may think that he is agent for P., though he is not; or

(iv.) he may know that he is not agent for P., though he chooses to say that he is.

As to (ii.), if he is really principal, it is his contract; he can sue and be sued upon it. The fact that he said he was acting as agent for somebody else does not matter, unless the deception has materially prejudiced the other party to the contract.[1]

As to (iii.) and (iv.), if he is not agent for P., or if he is his agent in some matters, but in making this contract was exceeding his authority, there is no contract. For the other party thinks he is contracting with P., and P.'s mind is not *ad idem*; P. cannot, therefore, be sued on the contract. Nor can the agent; for the other party never thought he was contracting with the agent personally. But the agent can be sued on his implied warranty that he had authority to contract as agent for P., and is liable for all damage sustained in consequence of his want of authority.[2] He is liable on the implied warranty whether he acted in a *bonâ fide* belief that he had authority or not; if he either knew or ought to have known that he had no authority, he can also be sued in tort for fraudulent misrepresentation.[3]

In an action for breach of warranty of authority the plaintiff can recover his actual consequent loss, and also the profit which he would have got had the agent possessed the pretended authority.[4] But the agent will not be liable if, at the time when he purported to act as agent, he expressly stated that he had not then got authority.[5] The alleged principal, as we have seen,[6] may always ratify a contract which another has made professedly as his agent.

Questions often arise as to who can sue and who should be sued on a contract entered into by an agent. If he really

[1] *Schmaltz* v. *Avery* (1851), 16 Q. B. 655.
[2] *Collen* v. *Wright* (1857), 8 E. & B. 647; *Bank of England* v. *Cutler*, [1907] 1 K. B. 889; [1908] 2 K. B. 208; *Yonge* v. *Toynbee*, [1910] 1 K. B. 215.
[3] *Polhill* v. *Walter* (1832), 3 B. & Ad. 114.
[4] *Simons* v. *Patchett* (1857), 7 E. & B. 568; *Spedding* v. *Nevell* (1869), L. R. 4 C. P. 212; *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295.
[5] *Halbot* v. *Lens*, [1901] 1 Ch. 344.
[6] See *ante*, p. 836.

was the duly authorised agent for P., then in every case P. can sue on the contract, because it is from him that the consideration moves. Or the agent can sue instead of P., unless he disclosed P. as his principal at the time of making the contract. And even in that case certain classes of agents (factors, carriers, &c.) may by virtue of their special property sue with their principal's consent. But a broker or a *del credere* agent cannot sue, if he disclosed his principal at the time of the contract.[1] A defendant can always set up against an agent what would be a defence against his principal. Similarly if the principal sues, anything can be set up against him which would have been a defence against his agent, if the agent had been able to sue and had in fact sued.[2]

If the principal is disclosed at the time of the contract, he is the right person to be sued. The agent cannot, as a rule, be sued unless he has purposely pledged his personal credit or signed the written contract so as to bind himself.[3] As we have seen, the agent may be sued if he warranted himself to have an authority which he did not in fact possess. If he has contracted on behalf of a fictitious or non-existent person, or of a person who cannot contract, the agent is personally liable.[4] By mercantile usage a British agent contracting on behalf of a foreign principal has ordinarily no authority to pledge his credit; unless it is shown that the agent was authorised to establish privity of contract between the foreign principal and the third party, the agent is personally liable.[5]

If the principal be not disclosed, the agent is personally liable. But if the principal be disclosed after the contract is made, but before judgment has been obtained against the agent, the other party may elect to sue the principal.[6] If, however, he knew at the time of making the contract who was the real principal, though the name was not mentioned,

[1] See *Fairlie* v. *Fenton* (1870), L. R. 5 Ex. 169, and *post*, p. 847.
[2] *George* v. *Clagett* (1797), 7 T. R. 359; and see *Montagu* v. *Forwood*, [1893] 2 Q. B. 350.
[3] See *Dramburg* v. *Pollitzer* (1873), 28 L. T. 470. As to the liability of an agent who signs a negotiable instrument, see *ante*, pp. 816, 817.
[4] See *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174.
[5] See *Malcolm* v. *Hoyle* (1893), 63 L. J. Q. B. 1.
[6] *Thomson* v. *Davenport* (1829), 9 B. & C. 78.

and yet in spite of that elected to give credit to the agent, he cannot afterwards sue the principal.[1]

Where an agent contracts under an agreement in which are words indicating agency, he is not personally liable, unless the usage of trade has that effect.[2] Where an agent signs a written contract as if intending to contract personally, parol evidence is inadmissible to discharge the agent, but is admissible to charge the principal. It is admissible to prove that the professed agent is in fact the real principal.[3] If, however, at the time of making the contract by which the agent rendered himself personally liable, a distinct collateral and contemporaneous agreement is entered into that the agent should not be personally liable, evidence of that agreement is admissible to prove that there never was such a contract as alleged.[4]

### *Various Classes of Agents.*

We have already distinguished a special agent from a particular agent.[5] It is necessary to deal here with certain other special classes of agents.

A factor is an agent entrusted with the possession as well as the disposal of property and is therefore by the nature of his employment authorised to receive payment for the goods of which he disposes.[6] Unless otherwise directed by his principal, a factor to whom goods are entrusted for sale may sell them in his own name[7] and at his own price.[8] He may give reasonable credit;[9] if trade usage permits, he may warrant the goods,[10] and, as we have seen above, he may validly pledge them. Unless it is expressly agreed to the contrary, a factor has by custom a lien over his principal's goods for all lawful claims arising out of the agency.

Brokers are only employed to buy and sell goods; they are not put in possession of them.

A broker has no implied authority to contract in his own

[1] *Paterson* v. *Gandasequi* (1812), 15 East, 62; *Addison* v. *Gandasequi* (1812), 4 Taunt. 574; *Williamson* v. *Barton* (1862), 31 L. J. Ex. 170; *Dunn* v. *Newton* (1884), 1 C. & E. 278.

[2] *Fleet* v. *Murton* (1872), L. R. 7 Q. B. 126; and see *Armstrong* v. *Stokes* (1872), L. R. 7 Q. B. at p. 605.

[3] *Carr* v. *Jackson* (1852), 7 Exch. 382.

[4] *Wake* v. *Harrop* (1862), 31 L. J. Ex. 451.

[5] *Ante*, p. 839.

[6] See *Drinkwater* v. *Goodwin* (1775), 1 Cowp. 251; and *ante*, p. 840.

[7] *Ex parte Dixon* (1876), 4 Ch. D. 133.

[8] *Smart* v. *Sandars* (1846), 3 C. B. 380.

[9] See *Houghton* v. *Matthews* (1803), 3 B. & P. at p. 489.

[10] *Dingle* v. *Hare* (1859), 7 C. B. N. S. 145.

name. When he has made the contract, his authority ceases: he, therefore, cannot alter or annul the contracts which he makes for his principal.[1] He may sign the memorandum required by the Sale of Goods Act as agent for both parties.[2] He may be sued on an implied warranty of authority.[3] Like a factor, he has a lien on all goods and papers of his principal in his possession.[4]

A *del credere* agent is a factor who, in consideration of an additional premium beyond the usual commission, warrants the solvency of the purchaser when he sells goods on credit. He is in fact a surety for the purchaser whom he has selected. His contract does not fall within the Statute of Frauds as a promise "to answer for the debt, default or miscarriage of another,"[5] and therefore need not be in writing.[6]

An auctioneer is a person authorised to sell goods publicly by auction. When so authorised, he has no authority to sell by private contract instead,[7] nor to warrant the goods.[8] But a clear and distinct verbal correction by an auctioneer of a material misdescription in the particulars of sale will bind the purchaser, even though he did not happen to hear it.[9] An auctioneer is agent for the seller; but when the hammer has fallen, he is also agent for the highest bidder. He therefore has authority to write down the purchaser's name, and to bind both parties by signing a memorandum to satisfy the Statute of Frauds or the Sale of Goods Act.[10] He has authority to receive payment for the proceeds of sales of goods,[11] and to receive deposits on sales of land,[12] and to give receipts. He should take payment in cash

[1] *Xenos* v. *Wickham* (1866), L. R. 2 H. L. 296.
[2] *Thomson* v. *Gardiner* (1876), 1 C. P. D. 777; but his clerk may not: *Henderson* v. *Barnewall* (1827), 1 Y. & J. 387.
[3] *Starkey* v. *Bank of England*, [1903] A. C. 114.
[4] *Mildred* v. *Maspons* (1883), 8 App. Cas. 874. As to stockbrokers' lien, see *In re London and Globe Corporation*, [1902] 2 Ch. 416.
[5] See *ante*, pp. 692—696.
[6] See *Sutton* v. *Grey*, [1894] 1 Q. B. 285.
[7] *Marsh* v. *Jelf* (1862), 3 F. & F. 234.
[8] *Payne* v. *Lord Leconfield* (1882), 51 L. J. Q. B. 642.
[9] *In re Hare and O'More's Contract*, [1901] 1 Ch. 93.
[10] *White* v. *Proctor* (1811), 4 Taunt. 209. This authority does not extend to an auctioneer's clerk: *Sims* v. *Landray*, [1894] 2 Ch. 318; *Bell* v. *Balls*, [1897] 1 Ch. 663.
[11] *Williams* v. *Millington* (1788), 1 H. Bl. 81.
[12] *Sykes* v. *Giles* (1839), 5 M. & W. 645.

only, except where a cheque is usual. If he takes a cheque, he must use care, and should not part with the objects sold until the cheque be cashed.[1] He has a lien for his charges upon all goods or money in his possession.[2]

The authority of a barrister to use his discretion while acting as an advocate in Court is complete.[3] If he agrees with opposing counsel to compromise or refer a case, he binds his client, unless he does so in contravention of express instructions given him by his client,[4] or unless the compromise or reference includes or affects matters outside the scope of the action.[5] Such an agreement is irrevocable, unless there has been a mistake.[6]

A solicitor may compromise an action upon terms once action is brought,[7] but not against his client's express instruction.[8] Before action brought he has no implied authority to compromise.[9] Payment or tender of a debt to the solicitor on the record is payment or tender to the client in the case ;[10] so also payment to his solicitor of a deposit on a sale of land is payment to the seller.[11] A solicitor has a lien for his costs upon his client's papers, but otherwise must hand them over in good order as required.[12] His general lien is unaffected by the fact that his client may have given him securities to secure the payment of particular costs.[13] He must keep proper accounts and must not disclose his client's secrets.

*Partnership.*

"Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership."[14]

[1] *Farrer* v. *Lacey* (1885), 31 Ch. D. 42 ; *Papé* v. *Westacott*, [1894] 1 Q. B. 272.
[2] *Webb* v. *Smith* (1885), 30 Ch. D. 192.
[3] See *Swinfen* v. *Lord Chelmsford* (1860), 5 H. & N. 890.
[4] See *Neale* v. *Gordon Lennox*, [1902] A. C. 465.
[5] *Kempshall* v. *Holland* (1895), 14 R. 336.
[6] *Hickman* v. *Berens*, [1895] 2 Ch. 638.
[7] *In re West Devon Great Consols Mine* (1888), 38 Ch. D. 51.
[8] *Fray* v. *Voules* (1859), 28 L. J. Q. B. 232.
[9] *Macaulay* v. *Polley*, [1897] 2 Q. B. 122. See *Yonge* v. *Toynbee*, [1910] 1 K. B. 215 (determination of authority by lunacy of client).
[10] *Butler* v. *Knight* (1867), L. R. 2 Ex. 109.
[11] *Ellis* v. *Goulton*, [1893] 1 Q. B. 350.
[12] *Tendring Hundred Waterworks Co.* v. *Jones*, [1903] 2 Ch. 615.
[13] *In re Morris*, [1908] 1 K. B. 473. See also the remarks of Neville, J., in *In re Rapid Road Transit Co., Ltd.* (1908), 99 L. T. at p. 775.
[14] Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5.

Those on whose behalf the business is carried on are partners and are liable for the business debts, not because they necessarily share in the profits, but because the debts were contracted on their behalf by persons who were their agents.[1] Participation in the profits is cogent, but not conclusive, proof of partnership.[2] A man's right to share in the profits and his liability for the losses are but the two usual consequences of the same cause—namely, the fact that the trade was carried on in his behalf. An infant partner, however, is not liable and cannot be sued for any of the debts of the firm.

An actual partnership, then, is where two or more agree to combine property or labour or both in a common undertaking to be conducted on behalf of each and every one of them. It is defined by statute as the relation subsisting between persons carrying on a business in common with a view to profit.[3] They may make private stipulations against the ordinary incidents of partnership attaching to them, which will be binding between the partners themselves; but they cannot in this way diminish the liability of any of them to third persons. Thus persons, who are not and never intended to be partners in fact, may be deemed partners in law *quoad* third persons.

It is provided by section 2 of the Partnership Act, 1890, that in determining whether a partnership does or does not exist, regard shall be had to the following rules:—

(1) Joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

To purchase goods so as to share profits on re-sale might make the parties partners.[4] It is possible that there may be a mere co-ownership as to property, while there is a partnership as to profits derived therefrom.[5]

(2) The sharing of gross returns does not of itself create a partnership,

[1] *Cox* v. *Hickman* (1860), 8 H. L. Cas. 268; *Mollwo, March & Co.* v. *Court of Wards* (1872), L. R. 4 P. C. 419. These decisions overrule *Waugh* v. *Carver* (1793), 2 Hy. Bl. 235.

[2] See 53 & 54 Vict. c. 39, s. 2 (3), and such cases as *Ex parte Tennant* (1877), 6 Ch. D. 303; *Hawksley* v. *Outram*, [1892] 3 Ch. 359.

[3] See 53 & 54 Vict. c. 39, s. 1 (1).

[4] *Reid* v. *Hollinshead* (1825), 4 B. & C. 867; and see *Oppenheimer* v. *Frazer & Wyatt*, [1907] 2 K. B. 50.

[5] *Davis* v. *Davis*, [1894] 1 Ch. 393.

whether the persons sharing such returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are derived.

(3) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business, and in particular—

(*a*) The receipt by a person of a debt or other liquidated amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such :

(*b*) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such :

(*c*) A person, being the widow or child of a deceased partner and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such :

(*d*) The advance of money by way of loan to a person engaged, or about to engage, in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business,[1] does not of itself make the lender a partner with the person or persons carrying on the business or liable as such, provided that the contract is in writing, and signed by or on behalf of all the parties thereto :

(*e*) A person receiving, by way of annuity or otherwise, a portion of the profits of a business in consideration of the sale by him of the goodwill of the business, is not by reason only of such receipt a partner in the business or liable as such.

A nominal partnership is one in which a man who has no interest in the business allows his name to be used by the firm. He is liable for the debts of the firm to all third persons who knew his name was used, unless they have received express notice that he is only an ostensible partner. Any acts which are sufficient to induce others to believe him to be a partner render him liable as such. A person "holding himself out" as partner is liable to anyone who deals with the firm on the faith of such representation.[2]

A dormant partner is one whose name does not appear to the world; he is liable for all the debts of the firm contracted during his partnership, even though the creditors never knew

[1] See *In re Young, Ex parte Jones*, [1896] 2 Q. B. 484, where the lender by contract was to receive a sum out of the profits.

[2] 53 & 54 Vict. c. 39, s. 14 (1).

of his existence. But he need not, like an ostensible partner, give notice of his retirement except to persons who knew of his connection with the firm. He is an actual, though undisclosed, partner; for the business is conducted on his behalf.

There are other classes of partners which deserve a passing mention. A particular partner is one who is partner with another in respect of a special transaction or in a particular line of business, as distinct from a general partner, who is interested in the whole of the business of the firm. The Limited Partnership Act, 1907,[1] has introduced into English law a new kind of partner, whose liability is limited to the amount of the capital which he risks in the partnership business. The authority of such a "limited" partner to bind his firm is the same as in other forms of partnership.

The relative rights of partners *inter se* are usually defined by agreements called articles of partnership. If the authority of one partner to bind his firm is restricted by such an agreement, his acts, if contrary thereto, will not be "binding on his firm with respect to persons having notice of the agreement." But they will bind the firm with respect to persons who have no such notice.[2]

In general, a partner's authority to act as agent is confined to acts necessary and incident to the carrying on of the partnership business. In matters outside the partnership business, the firm are not liable, unless they authorised the partner so to act,[3] or are estopped from denying his authority.[4] The firm are not bound, unless the partner has acted as agent; if he acted as principal, he alone is liable.[5]

In particular a partner has implied authority to draw cheques in the firm name on the firm's bank, to give receipts for payments to the firm, and to buy and sell goods for the partnership business. He may also assign book debts due to

[1] 7 Edw. VII. c. 24, s. 7.
[2] 53 & 54 Vict. c. 39, s. 8.
[3] S. 7.
[4] See *Farquharson Bros. & Co.* v. *King & Co.*, [1902] A. C. 325.
[5] *British Homes Assurance Corporation* v. *Paterson*, [1902] 2 Ch. 404.

the firm;[1] but he may not wipe out his personal debts by setting them off against debts due to the firm.[2] Nor has he any authority to settle a debt by accepting shares in a company.[3] A partner has no implied authority to bind his firm either by a submission to arbitration[4] or by a deed.[5] Nor may he bring his partners into partnership relations with other persons in other businesses.[6]

Where the partnership is an ordinary trading firm, a partner may borrow money in the name of the firm, and even assign to the lender the firm's book debts as security.[7] He can also sign bills of exchange or promissory notes so as to bind the firm.

But farmers in partnership are not an ordinary trading firm in this sense;[8] nor apparently are auctioneers.[9] And as there is no custom or usage that solicitors should be parties to negotiable instruments, nor is it necessary for the purposes of their business that they should be so, a solicitor has no implied authority to accept bills in the name of the firm.[10] Nor will a guarantee given by a solicitor bind his partners, unless it can be shown that they were aware of the transaction and that the security was given in pursuance of the ordinary practice of the parties.[11] Nor has a solicitor implied authority to bind his firm by a post-dated cheque drawn in the name of the firm.[12] A solicitor is not impliedly authorised by his firm to receive money indefinitely from a client with a view to laying it out upon proper security when found; but it is incidental to the business of a solicitor to receive money for the purpose of laying it out upon a particular mortgage, in which case a firm might be liable for the receipt of money by one of its members.[13] A solicitor has no implied authority to make himself a constructive trustee, so as to make an innocent partner liable.[14]

A partner's liability dates from the time of his becoming a partner.[15] If he wishes not to be bound by the acts of his

[1] See *Marchant* v. *Morton, Down & Co.*, [1901] 2 K. B. 829; *In re Briggs & Co.*, [1906] 2 K. B. 209.
[2] *Piercy* v. *Fynney* (1871), L. R. 12 Eq. 69.
[3] *Niemann* v. *Niemann* (1889), 43 Ch. D. 198.
[4] *Adams* v. *Bankart* (1835), 1 Cr. M. & R. 681; *Farrar* v. *Cooper* (1890), 44 Ch. D. 323.
[5] *Harrison* v. *Jackson* (1797), 7 T. R. 207.
[6] *Singleton* v. *Knight* (1888), 13 App. Cas. 788.
[7] *In re Briggs & Co., supra.*
[8] See *Greenslade* v. *Dower* (1828), 7 B. & C. 635; and see *Harris* v. *Amery* (1865), L. R. 1 C. P. at p. 154.
[9] *Wheatley* v. *Smithers*, [1907] 2 K. B. 684.
[10] *Hedley* v. *Bainbridge* (1842), 3 Q. B. 316, 321; *Levy* v. *Pyne* (1842), Car. & M. 453; *Garland* v. *Jacomb* (1873), L. R. 8 Ex. 216.
[11] See *Brettel* v. *Williams* (1849), 4 Exch. 623.
[12] *Forster* v. *Mackreth* (1867), L. R. 2 Ex. 163.
[13] *Harman* v. *Johnson* (1853), 2 E. & B. 61.
[14] *Mara* v. *Browne*, [1896] 1 Ch. 199.
[15] 53 & 54 Vict. c. 39, s. 17 (1).

fellow-partners, he must terminate his partnership and give notice of the dissolution.[1] If he be a "dormant" partner, notice will not be necessary;[2] nor is it necessary where the partner dies or becomes bankrupt. After dissolution the authority of a partner to bind the firm continues for the purpose of completing transactions unfinished at the date of dissolution, and of winding up the partnership.[3]

Partners may sue and be sued in the name of their firm, but if they sue in the firm name they can be compelled to disclose the name and address of every member of the firm.[4] If they are sued in the firm name, they must enter an appearance in their own names individually, but the subsequent proceedings may continue in the name of the firm.[5]

If judgment has been recovered against a firm, execution can at once issue without leave against all property of the firm within jurisdiction, and also against the goods of any individual partner who was served with the writ. But the plaintiff cannot without leave issue execution against any person who was not served with the writ. If such person dispute his liability, an issue will probably be directed to determine whether he was a partner or held himself out as a partner at the date of the contract.[6]

The judgment creditor of a man who is a partner in a firm can, under section 23 of the Partnership Act, 1890,[7] obtain an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and by the same or a subsequent order a receiver may be appointed of that partner's share of profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership.[8]

[1] 53 & 54 Vict. c. 39, s. 36.
[2] S. 36 (3).
[3] S. 38.
[4] Order XLVIIIA. r. 1; and see *Abrahams* v. *Dunlop Pneumatic Tyre Co.*, [1905] 1 K. B. 46.
[5] Order XLVIIIA. r. 5; and see *Ellis* v. *Wadeson*, [1899] 1 Q. B. 714.
[6] Order XLVIIIA. r. 8; *Davis* v. *Hyman*, [1903] 1 K. B. 854.
[7] 53 & 54 Vict. c. 39.
[8] And see Order XLVI. r. 1A.

## Chapter XII.

### MASTER AND SERVANT.

Closely akin to the relation of principal and agent are two other legal relationships—master and servant and employer and workman. The distinction between a servant and a workman, though clearly understood in ordinary intercourse, is difficult to define in legal language. The word "servant" has been used in different senses both by judges and in Acts of Parliament at different stages in the history of our law. On the other hand, the meaning of the terms "employer" and "workman" has been defined, as we shall see presently, with some precision by various statutes.[1]

A servant is one who for consideration agrees to work subject to the orders of another.[2] Where a person who does work for another is an independent contracting party, free to carry out the work in his own way and according to his own discretion, he is not a servant. In such a case the other party is not liable for any tortious or criminal act which the former commits in carrying out that work, unless the performance of the contract necessarily involved the commission of such tort or crime. But where a person is bound to do the work under the control and subject to the directions of another, he is his servant.[3]

A contract of service may be either express or implied from the conduct of the parties. The contract need not be drawn up in any particular form, unless it be such that it cannot be completely performed within one year. In the latter case there must be a memorandum in writing sufficient to satisfy the Statute of Frauds.[4] But if the parties contract

[1] See *post*, pp. 861—864.
[2] See Macdonell, Master and Servant, 2nd ed., p. 7.
[3] See *ante*, p. 352.
[4] See *ante*, pp. 700, 701; *Davey* v. *Shannon* (1879), 4 Ex. D. 81; but see *McGregor* v. *McGregor* (1888), 21 Q. B. D. 424.

for a year's service to begin on the day after the contract, it has now been decided that such an agreement requires no memorandum in writing.[1] Contracts for the hire of inferior servants are exempted from stamp duty,[2] and if made by a corporation, do not require to be under seal.[3]

Infants may enter into contracts of service, and will be bound by them if the contracts are for their own benefit.[4]

The consideration for a contract of service is, as a rule, an agreed sum to be paid as wages. From the fact that services have been rendered and accepted will generally be implied an agreement to pay wages. If the servant has left the question of wages entirely to his master's discretion, the servant cannot recover any sum even on a *quantum meruit*,[5] but it is otherwise if it was agreed that some wages should be paid, but the amount of the wages was left to the master's discretion.[6] The doing of extra work which is outside the contract of service would support a claim for extra pay.

As in other cases of contract, the law does not inquire into the adequacy of the consideration. An anticipated legacy from the master may be the consideration for the servant's work. An agreement to leave a legacy in return for service may be enforced against the master's executors.[7] Where a woman served as nurse to her aunt for three years at the aunt's request, it was held that she was unable to recover any wages in the absence of an express agreement.[8]

The length of the service is often not fixed by the terms of the contract. In the case of some inferior servants there is apparently a presumption that the contract is of a year's duration,[9] even if wages be paid monthly.[10] This presumption may be rebutted by evidence of a contrary usage;[11] the jury must look at all the facts of the case in deciding the terms upon which the parties contracted.[12] Payment of wages weekly or monthly is strong

[1] *Smith* v. *Gold Coast and Ashanti Explorers, Ltd.*, [1903] 1 K. B. 285, 538.
[2] 54 & 55 Vict. c. 39, sched. 1.
[3] See *Mayor of Ludlow* v. *Charlton* (1840), 6 M. & W. at p. 822; and *ante*, p. 665.
[4] *Clements* v. *L. & N. W. Ry. Co.*, [1894] 2 Q. B. 482; and see *post*, Book VI., Chap. II.
[5] See *ante*, pp. 737—741; and *Taylor* v. *Brewer* (1813), 1 M. & S. 290.
[6] *Peacock* v. *Peacock* (1809), 2 Camp. 45.
[7] See *Maddison* v. *Alderson* (1883), 8 App. Cas. 467; *Synge* v. *Synge*, [1894] 1 Q. B. 466.
[8] *Russel* v. *McClymont* (1906), 8 F. 821.
[9] *Lilley* v. *Elwin* (1848), 11 Q. B. 742.
[10] *Fawcett* v. *Cash* (1834), 5 B. & Ad. 904.
[11] *Baxter* v. *Nurse* (1844), 6 Man. & Gr. 935.
[12] *Warburton* v. *Heyworth* (1880), 6 Q. B. D. 1.

evidence of a contract of hiring for a week or a month. Contracts of service with the Crown are usually determinable at the pleasure of the Crown.

Except under certain special statutes,[1] a master is not obliged to give his servant a character.[2] But if he does so and makes representations as to the servant's character which he knows to be false to a third person who thereupon employs the servant, an action will lie for any damage which that third person sustains in consequence.[3] A servant who is improperly dismissed, or discharged without due notice, may immediately sue his master for such damages as will compensate him for the loss which he has actually sustained. And similarly, if the master refuses to allow him to begin his service, the servant may sue immediately.[4]

If master and servant have not expressly agreed upon the conditions under which each may terminate the contract, the conditions may be implied. "In the absence of misconduct or of grounds specified in the contract, the engagement can only be terminated after reasonable notice."[5] In the case of a menial servant a month's notice is deemed reasonable.[6] If improperly dismissed, the servant can then recover (in addition to wages already due, if any) a month's wages, for that is the probable loss. A servant must make reasonable efforts to obtain other employment, and if successful, the loss resulting from the previous dismissal will, of course, be diminished.[7] The length of reasonable notice in particular cases depends on the nature of the service; a clerk,[8] a governess,[9] and a schoolmistress[10] have been held entitled to three months' notice.

A servant may be dismissed without notice for wrongful disobedience of his master's lawful orders. But he is not bound to do work which he has not agreed to do; nor need he obey orders which imperil his life. If a servant

[1] Such as the Army Act, 1881 (44 & 45 Vict. c. 58), s. 92 (2); Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 128, 129.

[2] *Carrol* v. *Bird* (1800), 3 Esp. 201; and see the remarks of Lord Esher, M. R., in *Pullman* v. *Hill & Co.*, [1891] 1 Q. B. at p. 528.

[3] *Foster* v. *Charles* (1830), 7 Bing. 105. Giving a false character may be a criminal offence: 32 Geo. III. c. 56, s. 2; and see *R.* v. *Costello and Bishop*, [1910] 1 K. B. 28.

[4] See *ante*, pp. 741, 743.

[5] *Per* Lord Alverstone, C. J., in *In re African Association, Ltd., and Allen*, [1910] 1 K. B. at p. 399.

[6] As to proving a varying custom in respect of notice, see *Moult* v. *Halliday*, [1898] 1 Q. B. 125.

[7] See the remarks of Fry, L. J., in *Reid* v. *Explosives Co.* (1887), 19 Q. B. D. at p. 269.

[8] *Fairman* v. *Oakford* (1860), 5 H. & N. 635.

[9] *Todd* v. *Kellage* (1852), 22 L. J. Ex. 1.

[10] *Pottle* v. *Sharp* (1896), 65 L. J. Ch. 908.

becomes exposed by the nature of the service to additional risks not contemplated in the contract of hiring, he may cease to serve and may sue for his wages.[1]

Thus, where a waggoner refused to work late in the evening during harvest time unless supplied with certain beer in accordance with an alleged but unproved custom, it was held that this was a sufficient reason for dismissal.[2] And where a platelayer was dismissed for refusing, after day-work, to proceed to night-work without a further allowance for his time in proceeding thereto, this was held a proper dismissal.[3] In an extreme case a housemaid was held not to have been improperly dismissed for disobeying her master's orders in visiting her dying mother.[4] A master may dismiss a servant who "does anything incompatible with the due or faithful discharge of his duty to his master," or who by his own act prevents himself from being in a position duly and faithfully to perform his duty. "If a servant is guilty of such a crime outside his service as to make it unsafe for a master to keep him in his employ, the servant may be dismissed by his master;[5] and if the servant's conduct is so grossly immoral that all reasonable men would say he cannot be trusted, the master may dismiss him."[6]

Habitual drunkenness,[7] gross insubordination (something more than a single insolent act), or gross incompetence[8] are good grounds for dismissal. While the contract of service lasts, the servant can recover wages for a period of temporary illness,[9] but a servant's total inability to work (*e.g.*, through paralysis) would give the master a right to determine the contract. Though the master is at the time unaware of the existence of good grounds for dismissal, he has a good defence if it afterwards appears that good grounds in fact existed.[10] It is for the jury to say whether the facts disclose a valid ground of dismissal.[11] The contract being indivisible, a dismissed servant cannot claim for services for a period interrupted by dismissal, but may sue for wages due and unpaid before dismissal. He cannot, however, ask a jury to award him "exemplary" or "vindictive" damages, or to take into consideration any circumstances of harshness or oppression accompanying his dismissal, or any loss sustained by him from discredit thrown upon him by the manner of his dismissal.[12]

[1] See *O'Neil* v. *Armstrong, Mitchell & Co.*, [1895] 2 Q. B. 418, where the Chino-Japanese war supervened upon a contract between seaman and shipmaster.
[2] *Lilley* v. *Elwin* (1848), 11 Q. B. 742.
[3] *Beale* v. *G. W. Ry. Co.* (1901), 17 Times L. R. 450.
[4] *Turner* v. *Mason* (1845), 14 M. & W. 112.
[5] See *Thayre* v. *L. B. & S. C. Ry. Co.* (1906), 22 Times L. R. 240.
[6] *Per* Lord Esher, M. R., in *Pearce* v. *Foster* (1886), 17 Q. B. D. at p. 539 (merchant's clerk dismissed for speculating).
[7] *Speck* v. *Phillips* (1839), 5 M. & W. 279.
[8] *Harmer* v. *Cornelius* (1858), 5 C. B. N. S. 236.
[9] *Cuckson* v. *Stones* (1858), 28 L. J. Q. B. 25.
[10] *Ridgway* v. *Hungerford Market Co.* (1835), 3 A. & E. 171; *Boston Deep Sea Co.* v. *Ansell* (1888), 39 Ch. D. 339.
[11] *Clouston & Co., Ltd.* v. *Corry*, [1906] A. C. 122.
[12] *Addis* v. *Gramophone Co., Ltd.*, [1909] A. C. 488; but see the dissenting judgment of Lord Collins, p. 497.

A contract of service may be determined by mutual consent, which may be either express or implied from the conduct of the parties. The death of either the master or the servant will also determine the contract. The contract is a personal one; that is why agreements for service are never specifically enforced, and cannot be transferred or assigned without the consent of the other party. Death of a partner may terminate the contract of a servant of the partners, but not where the contract was made without particular regard to the character of the partnership business or the personality of the partners.[1] Bankruptcy of the master does not in itself determine contracts of service.[2]

Apprenticeship is a particular kind of contract of service. "No technical words are necessary to constitute the relation of master and apprentice."[3] The distinguishing feature of a contract of apprenticeship is that the one party should teach and the other should learn. Where, as is usually the case, the apprenticeship is for more than a year, the contract must be in writing. The indentures of apprentices to the sea are regulated by the Merchant Shipping Act, 1894.[4] In the absence of express agreement,[5] the master has no power to dismiss an apprentice for ordinary misconduct;[6] but if the apprentice be an "habitual thief," the master may dismiss him.[7] The term "workman" in the Workmen's Compensation Act, 1906, includes an apprentice.[8]

It has been found necessary from time to time to make laws to protect a class of persons who were supposed to lack the power to protect their own interests. A series of statutes called the Truck Acts[9] provide that workmen are not to have unreasonable deductions made from their wages (*e.g.*, for fines, damaged goods, materials, tools[10]), nor to have their wages paid otherwise than in lawful current coin,[11] nor to be obliged to spend their wages in any particular place

[1] See *Phillips* v. *Alhambra Palace Co.*, [1901] 1 Q. B. 59, and cases there cited.
[2] *Thomas* v. *Williams* (1834), 1 A. & E. 685.
[3] *Per* Lord Kenyon in *R.* v. *The Inhabitants of Rainham* (1801), 1 East, at p. 534.
[4] 57 & 58 Vict. c. 60, ss. 105—109; see also ss. 393—398.
[5] *Westwick* v. *Theodor* (1875), L. R. 10 Q. B. 224.
[6] *Winstone* v. *Linn* (1823), 1 B. & C. 460.
[7] *Learoyd* v. *Brook*, [1891] 1 Q. B. 431.
[8] 6 Edw. VII. c. 58, s. 13.
[9] See 1 & 2 Will. IV. c. 37; the Truck Amendment Act, 1887 (50 & 51 Vict. c. 46); and the Truck Act, 1896 (59 & 60 Vict. c. 44).
[10] See 59 & 60 Vict. c. 44, ss. 1—3.
[11] 1 & 2 Will. IV. c. 37, ss. 1 and 3.

or manner.[1] Various statutes have also been passed to improve the conditions of labour (and especially of child labour) in certain trades, as, for example, chimney-sweeping[2] and coal-mining.[3] Most important among the statutes dealing with employment are the Workmen's Compensation and Employers' Liability Acts.

At common law the relations of employer and workman stood as follows. Each was bound to conduct himself and his work so as not to injure others. Further "the contract between employer and employed involves, on the part of the former, the duty of taking reasonable care to provide appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk."[4] He was liable to an action for negligence, if in the conduct of his business he did or omitted to do anything which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would not do or omit to do, though he was not liable if the injured workman was guilty of contributory negligence.

Before the Employers' Liability Act, 1880,[5] "a servant might have sought redress from his master, subject to any defence the master might set up, in the following cases:—

(a) for injuries sustained by the servant by reason of the negligence of the master himself;

(b) for injuries sustained by reason of the negligence of a servant acting within the scope of the master's employment;

(c) for injuries sustained by reason of the master having negligently provided defective or dangerous implements or materials."[6]

It is still open to an injured workman, if he thinks fit, to

[1] 1 & 2 Will. IV. c. 37, s. 2; 50 & 51 Vict. c. 46, s. 6.

[2] See 3 & 4 Vict. c. 85.

[3] 50 & 51 Vict. c. 58. See also Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77); and, generally, Employment of Children Act, 1879 (42 & 43 Vict. c. 34); Factory and Workshops Act, 1901 (1 Edw. VII. c. 22), &c.

[4] *Per* Lord Herschell in *Smith* v. *Baker*, [1891] A. C. at p. 362.

[5] 43 & 44 Vict. c. 42.

[6] *Per* A. L. Smith, J., in *Weblin* v. *Ballard* (1886), 17 Q. B. D. at p. 124.

sue his employer on his liability under the common law. In order to succeed in such an action the plaintiff must establish negligence of the kind indicated in the last paragraph. And in such an action there are still three defences open to an employer:—

(i.) The doctrine of "common employment," which was enunciated in the case of *Priestley* v. *Fowler*,[1] still protects an employer from liability for the negligence of his agents and workmen, if the action be brought at common law. It may be stated thus: Where the person injured and the person who caused the injury are both workmen in the same employment, even though they are in very different grades of that employment and engaged in very different work, their common employer is not responsible for the consequences of the injury.[2]

(ii.) The employer may also find protection under another rule: if the workman knew and realised the risk of injury and voluntarily incurred the danger, the master is not liable.[3] This rule is based on the maxim *volenti non fit injuria*. But strong evidence is required of the workman's knowledge of the danger before the employer will be excused.

(iii.) The employer may also plead that the real cause of the injury was the contributory negligence of the workman.

At common law there was a fourth defence open to an employer, if the injuries to his workman proved fatal. Such a case was governed by the rule that "a personal action dies with the person"; so that, if a workman died in consequence of injuries received in the course of his employment, his personal representatives could not bring an action to recover damages on behalf of his widow and children or other dependants. This defence, however, was taken away in 1846 by Lord Campbell's Fatal Accidents Act.[4]

In 1880 was passed the Employers' Liability Act.[5] This Act gives to an injured workman in many cases a right of

[1] (1837), 3 M. & W. 1, confirmed in *Bartonshill Coal Co.* v. *Reid* (1858), 3 Macq. H. L. 266.

[2] See *Wilson* v. *Merry* (1868), L. R. 1 H. L. Sc. 326; *Johnson* v. *Lindsay*, [1891] A. C. 371.

[3] *Thomas* v. *Quartermaine* (1887), 18 Q. B. D. 685; *Smith* v. *Baker*, [1891] A. C. 325; *Coldrick* v. *Partridge, Jones & Co.*, [1910] A. C. 77.

[4] 9 & 10 Vict. c. 93, ss. 2—5; and see 27 & 28 Vict. c. 95.

[5] 43 & 44 Vict. c. 42.

action, which he did not possess at common law. It entitles him to compensation if his injury was caused by reason of—

(i.) the defective condition of ways, works, plant or machinery, provided such defect is attributable to the negligence of the employer or of some persons to whom he has delegated his duty in that behalf;

(ii.) the negligence of the employer's superintendents or of those to whom he has entrusted the duty of giving to the workmen orders or directions;

(iii.) some act or omission by a fellow workman in obedience to the employer's by-laws or to the particular instructions of one placed in authority over him; or

(iv.) the negligence of any fellow workman who has charge of any signal, points, locomotive engine or train upon any railway.[1]

In all actions brought under this Act the workman is given the same rights and remedies against his employer as anyone not in his service would have had; so that the doctrine of common employment does not apply. It still, however, remains open to the employer in any action under this Act to plead contributory negligence, or to set up the defence that the workman knew of the defect or negligence and did not complain to the employer or to some person superior to himself in the service within a reasonable time.[2] The master can also raise the technical defences that the workman did not give him proper notice of the accident or did not give it within the prescribed time.[3] Or it may be that the workman had contracted with his employer not to claim compensation under the Act for personal injuries.[4]

Under this Act the term "workman" includes every railway servant, labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner and everyone engaged in manual labour, but not a domestic or menial servant, nor a seaman; the term "employer" includes a body corporate.[5]

[1] Ss. 1 and 2.
[2] Unless he knew that the employer or such superior was already aware of it: s. 2 (3).
[3] S. 4.
[4] Such a contract is not against public policy, and the widow of a workman fatally injured, who sues under Lord Campbell's Act, will be bound by it: *Griffiths* v. *Earl of Dudley* (1882), 9 Q. B. D. 357.
[5] S. 8.

The action can only be brought in the county court.[1] Allowance is made for the pain and suffering caused by the injury; but the total sum recoverable cannot exceed the amount of three years' wages.[2]

In the year 1897 a novel principle was introduced into the law of employer and workman. By the Workmen's Compensation Act of that year [3] it was for the first time provided that in certain specified trades and works the employer should be liable to compensate any workman who was injured by an accident arising out of and in the course of his employment, whether the employer or any of his subordinates had been guilty of any negligence or had committed any breach of duty or not. The scope of this enactment was extended in 1900 to agricultural labourers.[4] In 1906 was passed the third Workmen's Compensation Act,[5] which repealed the two preceding Acts, though it has left untouched both the common law and the Employers' Liability Act, 1880. It will be observed that the right to compensation accorded to a workman by these Acts is not based upon any right of action in tort, but arises directly out of the contractual relation of employer and workman. It was thought right that, if a workman is injured in the course of his employment, the loss which he thereby sustains should be borne in substantially equal shares by his employer and himself. The employer is in fact made to insure his men. The sum awarded to the injured workman is not handed over to him in a lump sum, as are the damages recovered in an ordinary civil action; he is paid a weekly allowance in lieu of wages during his total or partial inability to work.

The Workmen's Compensation Act, 1906, provides that "if in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall" [subject to other provisions of the Act] "be liable to pay compensation." [6] But if the injury is

[1] S. 6 (1).
[2] S. 3.
[3] 60 & 61 Vict. c. 37.
[4] 63 & 64 Vict. c. 22.
[5] 6 Edw. VII. c. 58.
[6] 6 Edw. VII. c. 58, s. 1. As to the procedure under this Act, see Book V., Chap. XXIII.

"attributable to the serious and wilful misconduct of that workman, any compensation claimed in respect of that injury shall, unless the injury results in death or serious and permanent disablement, be disallowed."

A workman (or, in the event of his death, his dependants[1]) can also claim compensation if it be proved in the method prescribed by section 8 of the Act that he suffered from one of certain specified "industrial diseases,"[2] due to the nature of his employment, which

(i.) prevented him from earning full wages;

(ii.) caused him to be suspended from work; or

(iii.) caused his death.

Under this Act the utmost amount recoverable is one pound a week during total or partial incapacity to work, or £300 in case of death.[3] Notice of the accident and the claim for compensation must be sent to the employer within certain prescribed times; but failure to do so will not be a bar to the claim, if the employer has not been prejudiced thereby, or if the failure or delay was due to some reasonable cause.[4] The workman must, if required, submit to medical examination;[5] otherwise he will not be allowed to proceed with his claim. If the employer disputes his liability to pay compensation under the Act, or as to the amount or duration of the compensation payable by him, the question will be settled by arbitration, not by an action at law. The application for such an arbitration must be made to the judge of a county court, who will either act as arbitrator himself or appoint an arbitrator subject to the approval of the Lord Chancellor.

Under the Act of 1906 an "'employer' includes any body of persons corporate or unincorporate and the legal personal representative of a deceased employer, and, where the services of a workman are temporarily lent or let on hire to another person by the person with whom the workman

[1] As to who are "dependants," see s. 13: *Coulthard* v. *Consett Iron Co.*, [1905] 2 K. B. 869; *Hodgson* v. *West Stanley Colliery*, [1910] W. N. 67.

[2] See sched. III. and two statutory orders, dated May 22nd 1907, and December 2nd, 1908. It is possible that, apart from this section, infectious diseases may be "accidents" within the statute, though it may be difficult to show the date of such "accident" and to prove that it occurred in the course of the employment: see *post*, p. 933.

[3] See sched. I.

[4] S. 2 (1).

[5] At the employer's cost: sched. I. (4).

has entered into a contract of service or apprenticeship, the latter shall, for the purposes of this Act, be deemed to continue to be the employer of the workman whilst he is working for that other person." [1]

"'Workman' does not include any person employed otherwise than by way of manual labour whose remuneration exceeds two hundred and fifty pounds a year, or a person whose employment is of a casual nature and who is employed otherwise than for the purposes of the employer's trade or business, or a member of a police force, or an outworker,[2] or a member of an employer's family dwelling in his house, but save as aforesaid, means any person who has entered into or works under a contract of service [3] or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, is oral or in writing." [1] "The Act shall not apply to persons in the naval or military service of the Crown." [4]

To entitle an injured workman to compensation under this Act, he must satisfy the judge or arbitrator :—

(i.) that he has sustained personal injury through an accident; [5]

(ii.) that at the time of the accident he was in the employ of the respondent;

(iii.) that the accident arose out of his employment; and

(iv.) that the accident occurred in the course of his employment.[6]

If the applicant succeeds in establishing these four points, he need not prove negligence in anyone; it is wholly immaterial that he contributed to the accident by his own negligence, or that he voluntarily incurred a known risk, or that the injury was occasioned by the negligence of a fellow workman in the same employment. The only defences open to the respondent on proof of the above facts are :—

(*a*) that the applicant has not been disabled by his injuries for more than one week;

(*b*) that he has already recovered compensation for the same injuries either at common law or under the Employers' Liability Act, 1880;

[1] S. 13. As to workmen who are French citizens, see 9 Edw. VII. c. 16.

[2] An outworker is one who works for an employer, but in his own home and under such conditions as he himself arranges.

[3] As to "contract of service," see *Simmons* v. *Heath Laundry Co.*, [1910] 1 K. B. 543.

[4] S. 9 (1).

[5] For the definition of an accident, see *post*, pp. 930, 931.

[6] He must prove both (iii.) and (iv.): *Pomfret* v. *Lancs. and Yorks. Ry. Co.*, [1903] 2 K. B. 718; see *Low or Jackson* v. *General Steam Fishing Co.*, [1909] A. C. 523.

(*c*) that his injuries are attributable to his own serious and wilful misconduct; but it is found in practice very difficult to establish this defence—and, indeed, if the injuries have resulted in death, or serious and permanent disablement, it is not open to the employer to raise it;

(*d*) that the workman was employed under a scheme of compensation, benefit or insurance, which the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and workmen, had certified to be not less favourable to the workmen and their dependants than their rights under the Act.[1]

The respondent may also in reduction of damages show that the prolongation of the disability or that any special damage, such as the loss of a limb or a finger, was due to some unreasonable conduct on the part of the applicant, and was not the necessary result of the accident.[2]

The Act alters the ordinary law of contract—

(i.) by adopting the novel principle mentioned above, that the employer is to be liable apart from any breach of duty on the part of himself or the persons for whose acts he is responsible;

(ii.) in certain cases, where a "principal" has engaged a "contractor" for the whole or any part of any work undertaken by the "principal," the Act makes the "principal" liable to pay compensation, although there is no contractual relation whatever between him and the injured workman;[3]

(iii.) if the employer, after insuring his liability to compensate under the Act, becomes bankrupt (or, in the case of a company, has commenced to be wound up), the liability of the employer is transferred direct to the insurers, although there is no contractual relationship whatever between the insurers and the injured workman.[4]

Hence now, when a workman is injured in the course of his employment, there are three different methods of procedure open to him:—

(i.) He may sue either in the High Court or in the County Court for damages at common law. The amount of damages

[1] S. 3. A workman cannot contract himself out of his rights under the Act of 1906, except by an arrangement which is in strict accordance with the provisions of this section.

[2] *Marshall* v. *Orient Steam Navigation Co.*, [1910] 1 K. B. 79, 83.

[3] S. 4.

[4] S. 5.

which he can recover is not limited by any restriction dependent upon the amount of his wages, and it will be paid to him in one sum. But he will have to establish negligence in his employer or in someone for whose act or default the employer is responsible, and his claim is liable to be defeated by any of the defences indicated on p. 860.

(ii.) He can sue in the County Court for damages under the Employers' Liability Act, 1880. If he pursues this course, he can recover damages in many cases in which no action would lie at common law; he can recover a larger amount of damages than would be awarded him under the Act of 1906, and the amount recovered will be paid to him in a lump sum. But he will have to prove a great deal more than is necessary in proceedings taken under the Act of 1906.

(iii.) Lastly, he can claim compensation in the County Court under the Workmen's Compensation Act, 1906. The advantage of so doing is that he need not prove negligence on the part of anyone; he has merely to establish that he has sustained bodily injuries, which were caused by an accident arising out of and also in the course of his employment. It is now an incident attached to the contractual relation of employer and workman that they should share in any loss caused by such an accident. The disadvantage is that he can recover at the most only half his weekly wages or, if an infant, 10s. a week. It is also often regarded by the applicant as a disadvantage, though it is really a benefit, that he will not be paid his compensation in one sum, but will receive a weekly allowance during disability.

If, however, the workman is suffering from one of the industrial diseases mentioned above, which is due to the nature of his employment, and there has been no negligence on the part of his employer or of anyone for whose act or default the employer is responsible, the only remedy of the workman (or, in case of death, of his dependants) is to claim compensation under the Act of 1906.

## Chapter XIII.

### LANDLORD AND TENANT.

The relation of landlord and tenant arises when one person confers on another a right to the exclusive possession of lands or tenements for a fixed or determinate time, but always for a less period than that for which he himself has an interest in the premises. Such a relation may often be created by word of mouth; but the terms of the contract are usually (and in some cases must be[1]) embodied in an agreement or lease. The landlord is frequently called the lessor, and the tenant the lessee; the act of letting is called a demise, and the lease is usually granted in consideration of rent or of some other recompense payable at fixed periods.

When a man transfers his whole estate or interest in land to another, the document is not called a lease. If he is a freeholder, it is called a conveyance; if he has only a leasehold interest, it is called an assignment. Again, a lease must be distinguished from a mere licence; it confers on the lessee a "real right," namely, the right to prevent everyone else (including the landlord) from entering on the demised premises during the term. Thus a man, who contracts for a stall at an exhibition only for certain hours of the day, is a licensee and not a lessee,[2] even though the contract be drawn in the form of a lease.[3]

There are several different kinds of tenancies. The principal ones are:—

(i.) A tenancy for a term of years.

(ii.) A tenancy from year to year.

[1] See *post*, pp. 868, 869.

[2] *Rendell* v. *Roman* (1893), 9 Times L. R. 192; and see *Frank Warr & Co.* v. *L. C. C.*, [1904] 1 K. B. 713 (theatre refreshment bar).

[3] *Edwardes* v. *Barrington* (1901), 85 L. T. 650; *Glenwood Lumber Co.* v. *Phillips*, [1904] A. C. 405.

(iii.) A tenancy at will.

(iv.) A tenancy by sufferance.

There may also be quarterly, monthly, or weekly tenancies.

(i.) The period for which the tenancy is to continue must be certain; otherwise there would only be a tenancy at will.[1] The lessee must enter on the land by virtue of the lease; until he does so, he has only an interest in the term, and is not possessed of it. This interest is called an "*interesse termini*" and is alienable. An estate for years is frequently called a "term," because its duration is bounded or limited; it must have a certain beginning as well as a certain end.

A term of years may arise by estoppel. Thus, if a man demises for a term of years premises in which he has no interest and subsequently acquires an estate in them, then the lease takes effect. The lessor is estopped from denying its validity, and the lessee from disputing the lessor's title. Assignees of the original lessee are similarly estopped. But the lessor cannot distrain, for rent owed by the tenant, goods belonging to a stranger, for the stranger is not estopped from disputing the title.[2]

At common law writing was not necessary to the creation of a term of years. But now by the combined effect of the Statute of Frauds,[3] and the Real Property Amendment Act, 1845,[4] "all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments," unless made by deed, are void at law, and "have the force and effect of leases or estates at will only,"—except "leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts, at the least, of the full improved value of the thing demised."

[1] Co. Litt. 45 b, 54 b.

[2] *Tadman* v. *Henman*, [1893] 2 Q. B. 168.

[3] 29 Car. II. c. 3, ss. 1, 2.

[4] 8 & 9 Vict. c. 106, s. 3. As to the inadmissibility of oral evidence to vary, see *Henderson* v. *Arthur*, [1907] 1 K. B. 10.

By the Settled Land Act, 1882,[1] all leases made by limited owners under that Act must be by deed. This provision is more extensive than the Real Property Amendment Act, and applies to leases for all periods however short, whether they come under the provisions of the Statute of Frauds or not.

Leases in writing, but not under seal, may be construed as agreements capable of being specifically enforced.[2] At common law the tenant under such an agreement remained a tenant at will only, until he paid rent and so became a tenant from year to year; while in equity he became at once a tenant under the lease, if his agreement was one which he could have specifically enforced. "Since the Judicature Act . . . there are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. There is only one Court and the equity rules prevail in it. The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted,"[3] provided relief could have been given by specific performance. And even if the agreement be not in writing, it must be specifically raised by the tenant as a defence to any action brought against him by his landlord. Thus, if a tenant on being sued for rent pleads that there was no concluded agreement, and fails, he cannot afterwards raise the defence that there was no agreement in writing in an action for rent which subsequently becomes due.[4]

(ii.) A tenancy from year to year exists where both landlord and tenant are entitled to notice before the tenancy can be determined by either of them. By the common law, such notice must be given at least a half-year before the expiration of the current year of the tenancy, so that the tenancy may expire at that period of the year at which it commenced. In some cases more than six months' notice has been made necessary by statute;[5] but the tenant must occupy for a certain number of complete years.

A tenancy from year to year was originally a development of a tenancy at will, by which the tenancy at will was determinable only at that period of the year at which it commenced, and on reasonable notice. This was ultimately decided to be half a year. "A tenancy from year to year lasts

[1] 45 & 46 Vict. c. 38, s. 7.
[2] *Zimbler* v. *Abrahams*, [1903] 1 K. B. 577.
[3] *Per* Jessel, M. R., in *Walsh* v. *Lonsdale* (1882), 21 Ch. D. at p. 14; and see *Coatsworth* v. *Johnson* (1886), 55 L. J. Q. B. 220; *Manchester Brewery Co.* v. *Coombs* [1901] 2 Ch. 608. For a case which came before a Court unable to decree specifi performance, see *Foster* v. *Reeves*, [1892] 2 Q. B. 255.
[4] *Humphries* v. *Humphries*, [1910] 1 K. B. 796.
[5] See *post*, p. 893.

only so long as both parties please ; that is, it is determinable by either party at the end of any year, by giving notice to quit half a year before the end of the year. There is no reason why it should not be so determined by either party at the end of the first year—as well as at the end of any subsequent year, unless the parties have by express contract prevented such determination." [1] Mere permission, however, to occupy land creates but a tenancy at will, unless there are circumstances which show an intention to create a tenancy from year to year, as, for instance, an agreement to pay rent by the quarter or other aliquot part of a year.[2]

A demise for " one year certain " or for " one year only " does not create a tenancy from year to year, as it is to end on a precise day, and therefore no notice to quit is necessary to determine such a tenancy. A demise for one year, with an option at the end of that time to take a lease at a fixed rent *per annum*, has been held to give the tenant a right, after the first year, to a lease of at least one year.[3]

A tenancy from year to year may also arise by implication of law. Thus, where a lessee for a term of years holds over after the expiration of the lease and continues to pay rent quarterly to his landlord, he will, in the absence of any special agreement,[4] be deemed in law to be a tenant from year to year and will be bound by all such of his former covenants as are referable to a yearly tenancy[5]—but not if the liability which he thereby incurs would be of so serious a nature that he cannot be assumed to have contemplated it when he held over, *e.g.*, where the covenant in question would throw upon the tenant expenses for structural work largely in excess of the annual rent of the premises.[6]

(iii.) A tenancy at will exists " where lands or tenements are let by one man to another to have and to hold to him at the will of the lessor, by force of which lease the lessee is in possession. In this case the lessee is called tenant at will, because he hath no sure or certain estate, for the lessor may put him out at what time it pleaseth him." [7] Whenever

[1] *Per* Lord Denman, C. J., in *Doe* d. *Clarke* v. *Smaridge* (1845), 7 Q. B. at p. 958.
[2] *Richardson* v. *Langridge* (1811), 4 Taunt. 128.
[3] *Austin* v. *Newham*, [1906] 2 K. B. 167.
[4] *Oakley* v. *Monck* (1866), L. R. 1 Ex. 159.
[5] *Kelly* v. *Patterson* (1874), L. R. 9 C. P. 681 ; and see *Dougal* v. *McCarthy*, [1893] 1 Q. B. 736.
[6] *Valpy* v. *St. Leonard's Wharf Co.* (1903), 1 L. G. R. 305 ; *Harris* v. *Hickman*, [1904] 1 K. B. 13.
[7] Littleton, s. 68. As to what words create a tenancy at will, see the judgment of Jessel, M. R., in *Ex parte Voisey*, *In re Knight* (1882), 21 Ch. D. at p. 457.

the tenancy is determinable at the will of one party, the law implies it is also determinable at the will of the other.[1] An estate at will, therefore, may be determined by either party by express words or by any act which is inconsistent with the continuance of the tenancy; it is determined as soon as notice thereof reaches the other party.[2]

A tenancy at will may be created by agreement, express or implied. Where a person lives in a house rent free by permission of the owner, there is an implied tenancy at will. It may also arise by implication of law, where a tenancy from year to year cannot be inferred—for example, in the case of an entry under a void lease without any payment of rent or agreement to pay it.[3] A good example of a tenant at will is the minister of a dissenting congregation placed in possession of a chapel and dwelling-house by trustees in whom the property is vested.[4] A tenancy at will may also be created by an "attornment" clause in a mortgage deed, whereby the mortgagor "attorns" to or becomes tenant of the mortgagee, though the tenancy thus created is sometimes a tenancy from year to year, determinable as the parties may agree.

(iv.) A tenant by sufferance is one who has lawfully entered into possession of premises but who remains in possession of them after his right to do so has ceased, without the consent of their owner. The consent of the owner would at once convert it into a tenancy at will.

Certain persons—for example, infants, lunatics and convicts—may be disabled from granting leases, just as they are disabled from making other contracts.[5] The power of landowners to grant leases for periods not exceeding their own interest in the property has sometimes been curtailed by statute (as in the case of corporations and government departments), and sometimes extended (as in the case of tenants for life and other limited owners, mortgagors and mortgagees).

The power of the Crown to grant leases of Crown lands is confined by statute to the granting of occupation leases for 31 years,[6] of mining leases for 63 years,[7] and of building leases, or leases for foreshore building or

[1] Co. Litt. 55a.
[2] *Turner* v. *Doe* d. *Bennett* (1842), 9 M. & W. 646.
[3] See *ante*, p. 870.
[4] *Doe* d. *Rigge* v. *Bell* (1793), 5 T. R. 471.
[5] See Book VI., Law of Persons.
[6] 10 Geo. IV. c. 50, s. 22.
[7] 36 & 37 Vict. c. 36, s. 4.

reclamation, for 99 years.[1] The enrolment of assignments of Crown leases is no longer necessary.[2]

The leasing powers of civil corporations, municipal and others, are regulated by their respective Acts, public and private, and also by the Municipal Corporations Act, 1882.[3] The rules prevailing as to contracts made by corporate bodies apply to leases.

Universities and colleges are empowered to grant leases generally for 21 years, building leases for 99 years, and mining leases for 60 years.[4]

A large number of statutes have limited the common law powers of ecclesiastical corporations, sole and aggregate. Their leasing powers were expressly given and are now regulated by the Ecclesiastical Leasing Acts.[5] An incumbent may, with the consent of the patron of his living and the Ecclesiastical Commissioners, lease the lands, houses, mines, minerals or other property belonging to his benefice.[6]

Corporations and trustees for charitable uses may be lessees so long as the leases are in accordance with the provisions of the Mortmain and Charitable Uses Act, 1888.[7]

Tenants for life and limited owners generally have statutory power to grant, with certain exceptions, leases generally for 21 years, building leases for 99 years, and mining leases for 60 years.[8]

The Conveyancing Act, 1881,[9] conferred on the mortgagor or mortgagee in possession power to grant agricultural or occupation leases for 21 years and building leases for 99 years, on certain conditions therein enumerated. In cases where that Act does not take effect by reason of the mortgage deed being prior to January 1, 1882, or where the Act is excluded by express agreement, the mortgagor cannot, unless so empowered by the mortgage deed, grant a lease which will be valid against the mortgagee.[10]

There is another exception to the common law rule that the tenant's interest determines with that of the landlord. "Where the lease or tenancy of any farm or lands held by a tenant at a rack-rent" (*i.e.*, full rent obtainable in the market) "shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, the tenant shall continue to hold and occupy such farm or lands

[1] 10 Geo. IV. c. 50, s. 23; 8 & 9 Vict. c. 99, s. 1.

[2] See Crown Lands Act, 1906 (6 Edw. VII. c. 28), s. 5.

[3] 45 & 46 Vict. c. 50, s. 108, as amended by 51 & 52 Vict. c. 41, s. 72; and see *Davis* v. *Leicester Corporation*, [1894] 2 Ch. 208. As to corporations' leases for workmen's dwellings, see 53 & 54 Vict. c. 70, s. 74, &c., and the Housing, Town Planning, &c. Act, 1909 (9 Edw. VII. c. 44).

[4] 21 & 22 Vict. c. 44; 23 & 24 Vict. c. 59. See also 13 Eliz. c. 10, s. 4.

[5] 5 & 6 Vict. c. 108; 21 & 22 Vict. c. 57; 28 & 29 Vict. c. 57.

[6] See *Bartlett* v. *Phillips* (1859), 4 De G. & J. 414; *Ecclesiastical Commissioners* v. *Wodehouse*, [1895] 1 Ch. 552.

[7] 51 & 52 Vict. c. 42. For the powers given to the Charity Commissioners, see 16 & 17 Vict. c. 137, ss. 21, 26, and as to official trustees, see 18 & 19 Vict. c. 124; *In re Mason's Orphanage and L. & N. W. Ry. Co.*, [1896] 1 Ch. 54, 596.

[8] See 40 & 41 Vict. c. 18; 45 & 46 Vict. c. 38, ss. 6—14, 58—62. See also 52 & 53 Vict. c. 36; 53 & 54 Vict. c. 69, ss. 7—10.

[9] 44 & 45 Vict. c. 41, s. 18.

[10] *Thunder* v. *Belcher* (1803), 3 East, 449. See *Keech* v. *Hall* (1778), 1 Smith's L. C., 11th ed., 511. Statutes have dealt specially with agricultural holdings.

until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of the landlord's estate." [1]

### *Covenants.*

The stipulations contained in leases under seal are called covenants. The phrase "the usual covenants" has a special legal meaning. The "usual covenants" on the tenant's part include covenants to pay rent, to keep and deliver up the premises in a state of repair, to allow the landlord to enter and inspect the condition of the premises, and to pay rates and taxes other than those usually paid by the landlord.[2] The landlord on his side "usually" covenants that the tenant shall have "quiet enjoyment." This means that the landlord undertakes that the tenant shall quietly enjoy the premises, and shall not be disturbed by himself nor by anyone claiming under him, or paramount to him. This covenant is implied by law in every demise, unless restricted by the insertion of a more qualified express covenant.[3]

In deeds the word "demise" had the effect of creating this covenant;[4] in a parol letting the law will imply an agreement for quiet enjoyment, but not for good title.[5] In a demise of land a promise of quiet enjoyment during the term is implied.[6] But the lessor does not thereby covenant that the premises will endure during the term.[7] An agreement to let premises at a future date implies an undertaking by the lessor that he will then give a good title.[8]

A covenant that the lessee shall, while paying rent and performing his covenants, quietly enjoy, &c., is an absolute covenant for quiet enjoyment.[9] An action on this covenant may be maintained for the disturbance of a way of necessity;[9] or where the lessor uses his own quarry so as to cause water to percolate into the lessee's mine.[10]

[1] Landlord and Tenant Act, 1851 (14 & 15 Vict. c. 25), s. 1.
[2] See the judgment of Jessel, M.R., in *Hampshire* v. *Wickens* (1878), 7 Ch. D. at p. 561.
[3] *Spencer's Case* (1583), 5 Rep. 17a: *Jones* v. *Lavington*, [1903] 1 K. B. 253.
[4] See *Baynes* v. *Lloyd*, [1895] 1 Q. B. 820; [1895] 2 Q. B. 610.
[5] *Bandy* v. *Cartwright* (1853), 8 Exch. 913; and see *Gas Light and Coke Co.* v. *Towse* (1887), 35 Ch. D. 519.
[6] *Hall* v. *City of London Brewery Co.* (1862), 2 B. & S. 737.
[7] *Arden* v. *Pullen* (1842), 10 M. & W. 321.
[8] *Dawson* v. *Dyer* (1833), 5 B. & Ad. 584.
[9] *Morris* v. *Edgington* (1810), 3 Taunt. 24.
[10] *Shaw* v. *Stenton* (1858), 2 H. & N. 858. See *Aldin* v. *Latimer Clark*, [1894] 2 Ch. 437; *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q. B. 836.

The common law rule operates only in the absence of an express covenant. Thus where the lessor covenanted against eviction by himself and all persons claiming "by, from, or under him," it was held that there was no breach where the tenant was evicted by one whose title was paramount to the lessor's ;[1] nor was there where an entry was made upon the lessee and goods were seized by the collector of land tax for arrears due from the lessor before the demise.[2] In this latter case Lord Denman, C. J., points out that the claim was not by title from the lessor, but against the lessor, and consequently the disturbance was not within the covenant. And where the owners of the reversion upon a lease recovered possession of the premises, it was held that the covenant for quiet enjoyment in the underlease was not thereby broken.[3] When this covenant has been broken, the tenant is relieved from the payment of rent during the continuance of such breach, but is not released from the performance of any other covenant.[4]

This covenant for quiet enjoyment gives rise to a right of the tenant to deduct certain moneys from his rent when due. "The immediate landlord is bound to protect his tenant from all paramount claims; and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorised by the landlord so to apply his rent due or accruing due."[5] Payment of rent by a lodger to a superior landlord, who has distrained his goods for rent due from his immediate landlord, is deemed a valid payment of any rent due from him to his immediate landlord.[6]

At common law the lessor of furnished apartments impliedly covenants that they are fit for occupation.[7] In other cases there is no such implied covenant that premises are fit for occupation. In the absence of express agreement a lessor is not bound to repair,[8] nor to rebuild burnt premises,[9] nor to support ruinous premises.[10] Where premises were insanitary, it was held that the wife and children of the tenant could not recover against the landlord for loss and illness, as they were not parties to the contract.[11]

Every tenant is bound, without any express covenant or agreement to that effect, to keep the demised buildings

[1] *Merrill* v. *Frame* (1812), 4 Taunt. 329.
[2] *Stanley* v. *Hayes* (1842), 3 Q. B. 105.
[3] *Kelly* v. *Rogers*, [1892] 1 Q. B. 910.
[4] *Morrison* v. *Chadwick* (1849), 7 C. B. 266.
[5] *Per* Rolfe, B., in *Graham* v. *Allsopp* (1848), 3 Exch. at p. 198. See also the judgment of Pollock, C. B., in *Jones* v. *Morris* (1849), 3 Exch. at p. 747.
[6] Law of Distress Amendment Act, 1908 (8 Edw. VII. c. 53), s. 3.
[7] A similar implied covenant is created by statute under the Housing of Working Classes Act, 1890 (53 & 54 Vict. c. 70), s. 75, as extended by the Housing, Town Planning, &c. Act, 1909 (9 Edw. VII. c. 44), ss. 14, 15.
[8] *Gott* v. *Gandy* (1853), 2 E. & B. 845.
[9] *Bayne* v. *Walker* (1815), 3 Dow, 233.
[10] *Colebeck* v. *Girdlers Co.* (1876), 1 Q. B. D. 234.
[11] *Cavalier* v. *Pope*, [1906] A. C. 428; *Cameron* v. *Young*, [1908] A. C. 176.

"wind- and water-tight," and to manage the farm lands in a husbandlike manner according to the "custom of the country," and so to cultivate them as not to deteriorate them. The "custom of the country" to be recognised by law must, as we have seen,[1] be reasonable and certain, though not immemorial, and must be the custom of a whole district. It will then prevail in all tenancies, unless there be express covenants to the contrary effect or stipulations in the demise, which are inconsistent with the custom and are therefore taken to exclude it by implication.[2]

Express covenants are usually inserted in leases to define the course of cultivation to be adopted by the tenant. Their interpretation raises many points. The words "all mines and minerals" were held not to include flints, when it was the usage in the district that such belonged to the tenant and the express covenant did not contradict that usage.[3] Again, the words "he should not remove or sell during the last year" from the farm in question any hay, fodder or manure, were held to include not only that which was produced during the last year, but also what was produced at any time during the term;[4] clover sown with corn is still "tillage";[5] an agreement to cultivate and manage "as had been done" by the previous tenant applies only to his mode of cultivation on quitting, and not to the terms of his lease.[6] A covenant to cultivate "according to the best rules of husbandry practised in the neighbourhood" in an agricultural lease of a farm near London, was held not to be broken by the conversion of a part of the demised premises into a market garden, for it was proved at the trial that other farms in the neighbourhood had been converted into market gardens.[7] As the tenant must cultivate in a husbandlike manner, so he must keep all ditches, fences, and boundaries in repair.[8]

And now, by the Agricultural Holdings Act, 1908,[9] it is enacted that:—

"(1) Notwithstanding any custom of the country or the provisions of any contract of tenancy or agreement respecting the method of cropping of arable lands,[10] or the disposal of crops, a tenant shall have full right to practise any system of cropping of the arable land on his holding and to dispose of the produce of his holding without incurring any penalty, forfeiture, or

[1] *Ante*, pp. 78, 79.
[2] *Hutton* v. *Warren* (1836), 1 M. & W. 466.
[3] *Tucker* v. *Linger* (1883), 8 App. Cas. 508.
[4] *Gale* v. *Bates* (1864), 33 L. J. Ex. 235.
[5] *Birch* v. *Stephenson* (1811), 3 Taunt. 469.
[6] *Liebenrood* v. *Vines* (1815), 1 Mer. 15, 719; and see *Lord Hood* v. *Kendall* (1855), 17 C. B. 260.
[7] *Meux* v. *Cobley*, [1892] 2 Ch. 253.
[8] *Cheetham* v. *Hampson* (1791), 4 T. R. 318; and see Co. Litt. 41 b.
[9] 8 Edw. VII. c. 28, s. 26.
[10] "Arable land" does not include land in grass, which by the terms of any contract of tenancy is to be retained in the same condition throughout the tenancy: s. 26 (4).

liability: Provided that he shall previously have made, or, as soon as may be, shall make, suitable and adequate provision to protect the holding from injury or deterioration, which provision shall in the case of disposal of the produce of the holding consist in the return to the holding of the full equivalent manurial value to the holding of all crops sold off or removed from the holding in contravention of the custom, contract, or agreement.

This sub-section shall not apply—

(*a*) in the case of a tenancy from year to year, as respects the year before the tenant quits the holding or any period after he has given or received notice to quit which results in his quitting the holding; or

(*b*) in any other case, as respects the year before the expiration of the contract of tenancy.

(2) If the tenant exercises his rights under this section in such a manner as to injure or deteriorate the holding, or to be likely to injure or deteriorate the holding, the landlord shall without prejudice to any other remedy which may be open to him be entitled to recover damages in respect of such injury or deterioration at any time, and, should the case so require, to obtain an injunction restraining the exercise of the rights under this section in that manner, and the amount of such damages may, in default of agreement, be determined by arbitration.

(3) A tenant shall not be entitled to any compensation in respect of improvements comprised in Part III. of the First Schedule to this Act, which have been made for the purpose of making such provision to protect the holding from injury or deterioration as is required by this section."

We may notice here a few of the decisions, in which express covenants to repair have received judicial interpretation. Thus it has been held that a tenant, who has agreed to "substantially repair, uphold and maintain a house," is bound to do inside painting.[1] "Habitable repair" means a state of repair reasonably fit for the occupation of an inhabitant.[2] "External repairs" include boundary walls.[3] "Good tenantable repair" has been defined as "such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it."[4] A covenant to repair a house does not include laying a floor on an improved plan, nor putting on a new roof to an old house.[5] Where a lessee covenanted to repair and maintain the premises demised, he was held not liable to rebuild a house, which was old and had to be pulled down owing to faults in the foundations.[6] But he might be required to repair at the very beginning of the tenancy.[7] Where A. agreed with B. to let a warehouse, "the building

[1] *Monk* v. *Noyes* (1824), 1 C. & P. 265.
[2] *Belcher* v. *McIntosh* (1839), 8 C. & P. 720.
[3] *Green* v. *Eales* (1841), 2 Q. B. 225.
[4] *Per* Lopes, L. J., in *Proudfoot* v. *Hart* (1890), 25 Q. B. D. at p. 55.
[5] *Soward* v. *Leggatt* (1836), 7 C. & P. 613.
[6] *Lister* v. *Lane*, [1893] 2 Q. B. 212.
[7] *Truscott* v. *Diamond Rock Boring Co.* (1882), 20 Ch. D. 251.

to be put by me into good tenantable repair," it was held that A. was not bound to put it into repair for any particular purpose, and that if B. required any extra support for his goods he should have called A.'s attention to it while the repairs were being executed.[1] Opening doors in a wall and keeping them open, or pulling down a wall between two yards, is a breach of a covenant to repair;[2] not so the removal of fixtures which can be replaced at the termination of the tenancy.[3]

The covenant to repair generally extends to all buildings erected on the premises during the term, unless it is to repair the "building demised," in which case it will not include after-erected structures.[4] A covenant to erect buildings in a certain time, and to keep the buildings so erected in repair, is broken not only as a covenant to build, but also as a covenant to repair, if the lessee fails to erect them.[5]

Generally a tenant from year to year is answerable for keeping the premises in fair repair, but not for ordinary wear and tear, nor if they be burnt down.[6] Where the lease contains an express condition—"fair wear and tear excepted"—in favour of the tenant, he cannot apparently be made liable for dilapidations caused by exposure to atmosphere and ordinary use, and therefore he cannot be liable for the cost of external painting.[7] But a separate covenant by the tenant to paint both the inside and the outside of a house is now usually inserted in a lease.[8]

### *Waste.*

The tenant must not do anything that would destroy any part of the premises demised. This is expressed by saying he must not commit waste. Waste is of two kinds: voluntary and permissive. Voluntary waste consists of acts done by the tenant, and permissive waste is neglect of his duty to keep the premises demised in a state of preservation.[9] Decisions as to waste have been largely concerned with the cutting down of timber.[10] As a general rule, what trees are

[1] *McClure* v. *Little* (1868), 19 L. T. 287.
[2] *Doe* d. *Wetherell* v. *Bird* (1833), 6 C. & P. 195; *Gange* v. *Lockwood* (1860), 2 F. & F. 115.
[3] *Doe d. Burrell* v. *Davis* (1851), 15 Jur. 155.
[4] *Cornish* v. *Cleife* (1864), 3 H. & C. 446; *Smith* v. *Mills* (1899), 16 Times L. R. 59.
[5] *Bennett* v. *Herring* (1857), 3 C. B. N. S. 370; *Jacob* v. *Down*, [1900] 2 Ch. 156.
[6] *Ferguson* v. *Nightingale* (1797), 2 Esp. 590; *Torriano* v. *Young* (1833), 6 C. & P. 8. The Statute 14 Geo. III., c. 78, s. 86, does not affect the mutual rights and duties of landlord and tenant.
[7] *Terrell* v. *Murray* (1901), 17 Times L. R. 570; and see *Davies* v. *Davies* (1888), 38 Ch. D. 499.
[8] See *Martin* v. *Smith* (1874), L. R. 9 Ex. 50; *Moxon* v. *Townshend* (1887), 3 Times L. R. 392.
[9] As to the landlord's remedies for waste, see *post*, p. 901.
[10] See *Honywood* v. *Honywood* (1874), L. R. 18 Eq. at p. 309; *Dashwood* v. *Magniac*, [1891] 3 Ch. 306.

"timber" trees depends on the custom of the country; some, however, are always so reckoned, *e.g.*, elm and ash of more than 20 years' growth.[1] Other illustrations of waste are the destroying of heirlooms, ploughing up ancient meadow land, pulling down a house or other building demised, altering their nature by pulling down partition walls.[2]

Ploughing up strawberry-beds and removing a border of box, although planted by the tenant, have been held to amount to waste;[3] so also has destroying a quickset hedge of white-thorn.[4]

If a demise be made "without impeachment of waste," the tenant can commit acts of waste with certain exceptions.[5] These exceptions are those acts which would amount to an unconscientious use of the property, and were so restrained by the Courts of Equity, such as cutting down timber which sheltered the house or was planted to ornament it, or destroying the mansion.[6] This kind of waste is termed equitable waste. By the Judicature Act, 1873,[7] it is enacted that "an estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate." There is no corresponding clause to provide for the case of a tenant for a term of years, probably because the case could very seldom arise, as express covenants as to repairs are usually inserted in all leases. But he would nevertheless be restrained from committing equitable waste.

The rules respecting voluntary waste apply to all tenancies, but the committal of an act of voluntary waste by a tenant at will at once determines the tenancy, and renders the tenant liable to an action for trespass.[8]

Permissive waste is committed when buildings are allowed to go to ruin by the rotting of the timber or by the walls falling to pieces through not having been properly plastered.[9] Merely omitting to roof an unroofed house, or leaving land uncultivated, does not amount to waste, but leaving the banks of a river unrepaired, so that the water bursts through and does damage, amounts to waste.[10]

A tenant for a term of years is liable for permissive waste only, if he is

[1] *Aubrey* v. *Fisher* (1809), 10 East, 446, 455; *Whitty* v. *Dillon* (1860), 2 F. & F. 67. As to beech, willow and larch, see *ante*, p. 74.
[2] *Simmons* v. *Norton* (1831), 7 Bing. 640; *Jones* v. *Chappell* (1875), L. R. 20 Eq. 539.
[3] *Empson* v. *Soden* (1833), 4 B. & Ad. 655.
[4] Co. Litt. 53a.
[5] *Baker* v. *Sebright* (1879), 13 Ch. D. 179.
[6] *Vane* v. *Lord Barnard* (1716), 2 Vern. 738.
[7] 36 & 37 Vict. c. 66, s. 25 (3).
[8] *Harnett* v. *Maitland* (1847), 16 M. & W. 257.
[9] *Pyne* v. *Dor* (1785), 1 T. R. 55.
[10] See *Hutton* v. *Warren* (1836), 1 M. & W. 466

bound by a covenant to repair.[1] An action for permissive waste does not lie against a tenant from year to year.[2] Nor is a tenant at will liable for permissive waste, the uncertain nature of his tenure freeing him from liability for repairs.

### *Rent.*

Rent is the creature of agreement, and consequently a tenant is only bound to pay as rent such sum as is mutually agreed upon between himself and his landlord. The words "yielding and paying" in a lease amount in law to a covenant to pay rent. Rent is usually a fixed sum of money, but it may consist of manual labour, such as ploughing a certain quantity of land yearly, cleaning a parish church and ringing the bell,[3] or it may take the form of a royalty on bricks made in a brickfield, or on every ton of the coal brought to the surface from a coal mine.[4] But the rent must be certain. If the amount be not actually fixed, it must be clearly ascertainable. "No distresse can be taken for any services that are not put into certaintie, nor can be reduced to any certainty;" but it is a good reservation if a tenant agrees as his rent "to sheere all the sheepe depasturing within the lord's manor, for this is certaine enough, albeit the lord hath sometime a lesser number there."[5] But a percentage on outlay on improvements to be made by the landlord, though reserved as a rent payable by the tenant, is not recoverable by distress, but only by action on the agreement.[6]

Rent must be reserved to the lessor and must, as a rule, be paid to him or to his duly authorised agent. But under the Judicature Act, 1875, the right to recover it can be assigned to a stranger. And in the case of any lease made since 1881,[7]

[1] *Herne* v. *Bembow* (1813), 4 Taunt. 764; but see *Davies* v. *Davies* (1888), 38 Ch. D. 499, where Kekewich, J., decided that a tenant for a term of years is liable for permissive waste. A tenant for life is apparently not so liable: *In re Cartwright, Avis* v. *Newman* (1889), 41 Ch. D. 532.

[2] *Torriano* v. *Young* (1833), 6 C. & P. 8; *Leach* v. *Thomas* (1835), 7 C. & P. 327.

[3] *Doe* d. *Edney* v. *Benham* (1845), 7 Q. B. 976.

[4] As to a way-leave, see *N. E. Ry. Co.* v. *Lord Hastings*, [1900] A. C. 260.

[5] Co. Litt. 96 a. See *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9; *Budd-Scott* v. *Daniell*, [1902] 2 K. B. 351.

[6] *Hoby* v. *Roebuck* (1816), 7 Taunt. 157; *Lambert* v. *Norris* (1837), 2 M. & W. 333; *Adams* v. *Hagger* (1879), 4 Q. B. D. 480.

[7] 44 & 45 Vict. c. 41, s. 10. See *Whitlock's Case* (1608), 8 Rep. 69 b; *Turner* v. *Walsh*, [1909] 2 K. B. 484.

the rent is annexed to, and goes with, the reversionary estate immediately expectant on the term granted by the lease; it may be recovered by the person for the time being entitled (subject to the term) to the income of the land leased. When the landlord is one of several joint tenants, he may (unless the lessee have notice from the other joint tenants not to pay to him) receive rent from the lessee, and give a good discharge for it.[1]

A rent reserved in general terms, without specifying any time for payment, will be payable at the end of each year, even though a subsequent parol understanding is come to between the parties that the rent is to be paid quarterly.[2]

The time at which the rent is payable is, however, usually regulated by a clause in the lease. Such clause should expressly dispense with the necessity for any formal demand of the rent; otherwise, in order to create forfeiture for non-payment, the rent must be demanded on the premises immediately before sunset on the day on the morning of which it became due.[3] Should the demand be made any sooner on that day, it will be bad.[4] If the landlord, to oblige the tenant and without further consideration, alters the day of payment, this is not binding upon him in law.[5]

The tenant has a statutory right to make certain deductions from his rent in respect of certain rates and taxes which he has paid, such as the landlord's property tax, which is payable by the tenant on behalf of the landlord and for which the landlord must allow a deduction from the next quarter's rent under a penalty of £50.[6] Others, such as certain rates under the Public Health Act, 1875,[7] and the Towns Improvement Clauses Act, 1847,[8] are, in the absence of an agreement to the contrary, if paid by the tenant, to be allowed by the landlord. In tenancies for a short term, or where the landlord undertakes and neglects to pay them, the poor rates

[1] *Robinson* v. *Hofman* (1828), 4 Bing. 562.
[2] *Cole* v. *Sury* (1627), Latch, 264; *Turner* v. *Allday* (1836), Tyr. & Gr. 819; *Collett* v. *Curling* (1847), 16 L. J. Q. B. 390.
[3] *Tinckler* v. *Prentice* (1812), 4 Taunt. 549; *Dibble* v. *Bowater* (1853), 2 E. & B. 564.
[4] *Doe* v. *Paul* (1829), 3 C. & P. 613. The necessity of proving "a common-law demand" has, however, been removed by s. 210 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), in the cases mentioned *ante*, pp. 435, 436.
[5] *In re Smith and Hartogg* (1895), 73 L. T. 221.
[6] 5 & 6 Vict. c. 35, ss. 73, 103, and s. 60, Sched. A., No. IV., r. 9.
[7] 38 & 39 Vict. c. 55, ss. 104, 214, 257.
[8] 10 & 11 Vict. c. 34, s. 45; 38 & 39 Vict. c. 55, s. 160.

come under the same category.[1] Under the Licensing Act, 1904, the licence-holder may deduct from his rent a certain proportion of a charge imposed upon the licensed premises by Quarter Sessions, in spite of any agreement to the contrary.[2]

Sometimes an additional rent is reserved by a lease in case the lessee commits or omits certain acts. In such a case the lease and covenants must be read to see whether the lessee is to be allowed to do or omit such acts and merely pay the additional sum as compensation,[3] or whether it is intended that the lessee is to be prohibited from doing or omitting the acts. In the latter case the lessor will be entitled to re-enter as on a forfeiture for breach of condition.[4] It is also important to determine whether this additional rent is reserved by way of penalty or of liquidated damages.[5] But if the farm is an agricultural holding the tenant is expressly relieved from distress by the landlord for such penal rent or liquidated damages, except where the condition which the tenant has broken is one restraining "the breaking up of permanent pasture, the grubbing of underwoods, or the felling, cutting, lopping or injuring of trees, or regulating the burning of heather."[6]

## *Right to Distrain.*

The relation of landlord and tenant gives the landlord a right to distrain for rent due.[7] But certain conditions must first be fulfilled. The rent must be certain and there must either be an actual demise, or the tenant must have entered into possession under an agreement which can be specifically enforced. The right can be exercised at any time during the tenancy or within six calendar months after its determination, provided in the latter case that the landlord's title or interest still continues and the tenant is still in possession.[8] And during the same period the executor or administrator of a deceased landlord can distrain for all rent due to the landlord during his lifetime.[9]

[1] 32 & 33 Vict. c. 41, ss. 1, 8.
[2] 4 Edw. VII. c. 23, s. 3, and Sched. II. And see *Hancock* v. *Gillard*, [1907] 1 K. B. 47.
[3] See *Legh* v. *Lillie* (1860), 6 H. & N. 165.
[4] See *Weston* v. *Metropolitan Asylum District* (1881), 8 Q. B. D. 387; (1882), 9 Q. B. D. 404.
[5] *Wallis* v. *Smith* (1882), 21 Ch. D. 243; *Diestal* v. *Stevenson*, [1903] 2 K. B. 345.
[6] 8 Edw. VII. c. 28, s. 25.
[7] This is so, even in the case of a weekly tenancy (*Yeoman* v. *Ellison* (1867), L. R. 2 C. P. 681), and also in the case of a tenancy at will, if any rent has been reserved (*Morton* v. *Woods* (1868), L. R. 3 Q. B. 658; (1869), L. R. 4 Q. B. 293).
[8] 8 Anne, c. 14, ss. 6, 7 (c. 18 in revised edition).
[9] 3 & 4 Will. IV. c. 42, ss. 37, 38.

The rent must not only be due, but in arrear; the landlord cannot distrain until the day after that on which the rent was payable.[1] The landlord must have a reversion in himself to entitle him to distrain;[2] it does not matter how short it be. For instance, a tenant from year to year, underletting from year to year, has a sufficient reversion to entitle him to distrain on the under-tenant in possession. But a lessee, who has assigned the whole of his interest to another, cannot distrain, even for rent which was due at the date of the assignment; he can only recover it by an action.[3] And it is not enough, apparently, that the person in whom the legal reversion is vested has agreed in writing to assign it to the distrainor, unless the latter has subsequently entered on the premises under and by virtue of that agreement.[4]

In the case of an agricultural holding the landlord cannot distrain in respect of rent which became due more than a year before the distress;[5] and, if the amount of compensation due to the tenant has been ascertained, he can only distrain for the balance of the rent due after deduction of such compensation.[6]

A landlord cannot, as a rule, distrain twice for the same rent. "If there is a fair opportunity and no lawful or legal cause why he should not work out the payment of rent by reason of the first distress, his duty is to work it out by the first distress. He must not vex his tenant by the exercise upon two occasions of this summary remedy."[7] The fact that the landlord was misled as to the value of the goods, which was uncertain,[8] or that the value of the cattle taken (where cattle are distrained) was not sufficient,[9] or that the tenant prevented the landlord from realising the value of the goods distrained,[10] would be "lawful or legal cause" for a second distress. So will the fact that the landlord abandons the goods distrained either through being induced to do so by the false representations of the tenant,[11]

[1] See *Child* v. *Edwards*, [1909] 2 K. B. 753 (rent due on Sunday).
[2] As to the rights of a mortgagor and mortgagee respectively to distrain, see the notes to *Moss* v. *Gallimore* (1779), 1 Smith L. C., 11th ed., at pp. 521—523.
[3] *Staveley* v. *Allcock* (1856), 16 Q. B. 636.
[4] *Lewis* v. *Baker*, [1905] 1 Ch. 46.
[5] 8 Edw. VII. c. 28, s. 28 (1): but see s. 28 (2).
[6] *Ib.*, s. 31.
[7] *Per* Parke, B., in *Bagge* v. *Mawby* (1853), 8 Exch. at p. 649.
[8] *Hutchins* v. *Chambers* (1758), 1 Burr. 589.
[9] See 17 Car. II. c. 7, s. 4.
[10] *Lee* v. *Cooke* (1858), 3 H. & N. 203.
[11] *Wollaston* v. *Stafford* (1854), 15 C. B. 278.

or for his accommodation at his request.[1] An illegal entry by a bailiff who was afterwards withdrawn was held to be a trespass, not a distress; therefore the landlord could distrain afresh for the same rent.[2]

The landlord, as a general rule, may distrain any goods which he finds on the premises. But to this rule there are many exceptions. He cannot now effectively distrain on the goods of any under-tenant or lodger; and even of the goods of his immediate tenant some are absolutely, and some are conditionally, privileged from distress. Goods conditionally privileged from distress may not be seized, if there are other goods sufficient to satisfy the demand; and it is for the landlord to show that this is not the case.[3]

(i.) The goods of any under-tenant or lodger, which are on the demised premises, are protected from distress by the Law of Distress Amendment Act, 1908.[4] This statute enacts that, where a superior landlord levies a distress on the goods of an under-tenant or lodger or "any other person whatsoever not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof," such under-tenant, lodger or person may make a declaration that the immediate tenant has no property in the goods distrained. If the distress be then proceeded with, it is illegal and application may be made to a magistrate's court for the restoration of the goods. The goods, however, of the husband, wife, or partner of the immediate tenant of the distrainor are not protected by the Act.[5]

(ii.) Some goods are absolutely privileged from distress. Of these the most important class is that of "fixtures," which are privileged because they are considered to be part of the thing demised, and so are all other things which are in the eye of the law part of the realty, such as keys, windows, and charters concerning the realty. By a common law rule things could not be distrained which could not be restored in the same condition; for they are only taken as a pledge for the rent due. Therefore perishable goods, such as newly-slaughtered butcher's meat, could not be distrained.[6] Nor can money, unless it is in a bag, so that the same specific coins can be recovered.[7] Besides the nature of the attachment to the freehold, the object of such annexation must be considered, whether it was to improve the inheritance, or to ensure the more complete enjoyment

[1] *Thwaites* v. *Wilding* (1883), 12 Q. B. D. 4; *Crosse* v. *Welch* (1892), 8 Times L. R. 401, 709.
[2] *Grunnell* v. *Welch*, [1905] 2 K. B. 650; and see *ante*, pp. 457, 458.
[3] *Nargett* v. *Nias* (1859), 1 E. & E. 439.
[4] 8 Edw. VII. c. 53, ss. 1, 2.
[5] *Ib.*, s. 4.
[6] *Morley* v. *Pincombe* (1848), 2 Exch. 101.
[7] Bacon's Abr., Distress B.; 1 Rolle, Abr. 667.

of it as a chattel.[1] Those affixed for the former purpose are not liable to be distrained.[2]

Distress cannot affect incorporeal rights.[3] Those things which are delivered to a person exercising a public trade to be worked, carried, wrought up or managed in the way of his trade or employ cannot be distrained; they are privileged for the sake of trade and commerce.[4]

Thus, a horse standing in a blacksmith's shop to be shod; corn delivered to a miller to be ground;[5] cattle sent to a butcher to be killed;[6] goods given to a carrier to be carried, or to an auctioneer to be sold upon his own premises;[7] goods pledged with a pawnbroker, or deposited for safe custody such as furniture at a depository,[8] or goods deposited with a wharfinger, or granary-keeper[9]—none of these can be lawfully distrained. "The exception has been acted on for so many years that it is impossible now to extend it by judicial decision," said Lord Herschell, L. C., in *Clarke* v. *Millwall Dock Co.*,[10] where a vessel, in the process of being constructed, and paid for by the owner as the work progressed, was held not to be privileged from distress, as it had not been "delivered" to the builder. A picture sent to an artist for alteration is not privileged, as painting is not considered a public trade.[11]

In the case of an innkeeper, the goods and horses of his guests at the inn are privileged so long as they are on the premises.[12] Again, things which are actually in some person's use are privileged, in order to prevent breaches of the peace occurring in the attempt to carry out such a distress.[13] Goods in the custody of the law are exempt,[14] except where growing crops have been seized and sold under an execution, in which case so long as they remain on the land, they are liable to be distrained for rent which became due after the seizure and sale.[15]

By statute, more exceptions have been established. Thus the sale of farming stock taken in execution is regulated by 56 Geo. III. c. 50, s. 6.[16]

[1] *Hellawell* v. *Eastwood* (1857), 6 Exch. 295; and see *Holland* v. *Hodgson* (1872), L. R. 7 C. P. at pp. 333—340.
[2] *Darby* v. *Harris* (1841), 1 Q. B. 895.
[3] *British Mutoscope Co.* v. *Homer*, [1901] 1 Ch. 671.
[4] *Simpson* v. *Hartopp* (1744), 1 Smith L. C., 11th ed., 437.
[5] Co. Litt. 47 a.
[6] *Brown* v. *Shevill* (1834), 2 A. & E. 138.
[7] *Adams* v. *Grane* (1833), 1 Cr. & M. 380. As to the limit of the exception, see *Lyons* v. *Elliott* (1876), 1 Q. B. D. 210.
[8] *Swire* v. *Leach* (1865), 18 C. B. N. S. 479; *Miles* v. *Furber* (1873), L. R. 8 Q. B. 77.
[9] *Thompson* v. *Mashiter* (1823), 1 Bing. 283; *Matthias* v. *Mesnard* (1826), 2 C. & P. 353.
[10] (1886), 17 Q. B. D. at p. 500.
[11] *Von Knoop* v. *Moss* (1891), 7 Times L. R. 500. See *Edwards* v. *Fox* (1896), 60 J. P. 404. As to pictures sent for exhibition or sale, see *Challoner* v. *Robinson*, [1908] 1 Ch. 49; but see the Law of Distress Amendment Act, 1908 (8 Edw. VII. c. 53).
[12] *Robinson* v. *Walter* (1616), 3 Bulst. 269. As to auctioneers, see *Lyons* v. *Elliott* (1876), 1 Q. B. D. 210.
[13] Co. Litt. 47 a; *Field* v. *Adames* (1840), 12 A. & E. 649.
[14] See *In re Benn-Davis* (1885), 55 L. J. Q. B. 217.
[15] 14 & 15 Vict. c. 25, s. 2.
[16] See *Hutt* v. *Morrell* (1847), 11 Q. B. 425.

Under the Law of Distress Amendment Act, 1908,[1] a lodger, an under-tenant, and indeed anyone, whose goods are seized for rent due by the immediate to the superior landlord, may make a declaration (and inventory) that his immediate landlord has no property in the goods distrained, and that such goods are his lawful property ; and then on serving such declaration on the bailiff, and on paying to the superior landlord whatever sum he may owe for rent to his immediate landlord, his goods are no longer liable to distress ; and any further detention of them by the distrainor amounts to an illegal distress.

Under the Law of Distress Amendment Act, 1888,[2] the wearing apparel and bedding of a tenant and his family and the tools and implements of his trade, to the value of £5, are exempted from distress for rent, except after the expiration of seven days from a demand for possession of premises in respect of which the lease, term or interest of the tenant has determined ; if such goods are taken contrary to the provisions of the Act, a Court of Summary Jurisdiction may make a summary order that they be restored if they have not been sold.[3]

Frames, looms, materials or tools in either woollen, worsted, linen, cotton, flax, mohair or silk manufactures, are exempt from distraint for rent under any execution or process whatever, unless the rent for which distraint is made be owing by the owner of the loom or other machine.[4]

By the Gasworks Clauses Act, 1847,[5] gas-meters and fittings "shall not be subject to distress . . . for rent of the premises where the same may be used." This provision includes such articles as gas-stoves let for hire.[6] Electric meters and fittings are similarly protected.[7]

Rolling stock of a railway company employed in a colliery or other work is not liable to be distrained for rent due by the parties using it, provided the conditions requiring the owner to be indicated are complied with.[8]

By the Agricultural Holdings Act, 1908, "agricultural or other machinery which is the property of a person other than the tenant, and is on the holding under an agreement with the tenant for the hire or use thereof in the conduct of his business, and live stock which is the property of a person other than the tenant, and is on the holding solely for breeding purposes, shall not be distrained for rent."[9]

(iii.) Goods, which are conditionally privileged from distress, would be such chattels as beasts of the plough, sheep, instruments of husbandry, tools not in actual use.[10]

[1] 8 Edw. VII. c. 53, s. 1. The declaration need not be made on oath : *Rogers, Ewngblut & Co.* v. *Martin* (1910), 26 Times L. R. 459.

[2] 51 & 52 Vict. c. 21, s. 4, and see 51 & 52 Vict. c. 43, s. 147 ; explained in *Boyd, Ltd.* v. *Bilham* (1908), 99 L. T. 780. Bedding includes a bedstead : *Davis* v. *Harris*, [1900] 1 Q. B. 729.

[3] 58 & 59 Vict. c. 24, s. 4.

[4] 6 & 7 Vict. c. 40, s. 18.

[5] 10 & 11 Vict. c. 15, s. 14.

[6] *Gas Light & Coke Co.* v. *Hardy* (1886), 17 Q. B. D. 619.

[7] 45 & 46 Vict. c. 56, s. 25.

[8] 35 & 36 Vict. c. 50, s. 3. See *Easton Estate Co.* v. *Western Waggon Co.* (1886), 54 L. T. 735.

[9] 8 Edw. VII. c. 28, s. 29 (4).

[10] 52 Hen. III. c. 4 ; *Keen* v. *Priest* (1859), 4 H. & N. 236.

Under the Agricultural Holdings Act, 1908, live stock at agistment on a holding, are conditionally exempt ; if taken in to be fed, they are only distrainable for the amount due for their feeding.[1] Corn, hay, straw and growing crops when ripe, though not distrainable at common law, have under certain conditions been made so by statute.[2]

Unless the tenant makes an agreement to the contrary,[3] the landlord can only distrain goods which are on the lands out of which the rent issues. If the tenant, after his rent is in arrear,[4] fraudulently or clandestinely remove his own chattels off the premises and does not leave thereon sufficient to meet the arrears,[5] the landlord may within thirty days take and seize such goods, wherever found.[6] And the landlord may also distrain the cattle or stock of his tenant feeding upon any common appendant or appurtenant, or in any way belonging to the demised premises.[7]

The landlord may distrain either personally or by a bailiff. In the latter case the bailiff must be authorised to act as such by a certificate in writing, given by the judge or registrar of a County Court; otherwise the distress will be illegal.[8] The distress must be made between sunrise and sunset. A bailiff or other person distraining may climb over a fence or wall enclosing a garden,[9] and thus get to the building, and then proceed by any unfastened door or open window to effect a levy in the house. But the premises must (except in the case of fraudulent removal[10]) be entered without breaking open an outer door or a window.[11] If, however, the distrainor

[1] 8 Edw. VII. c. 28, s. 29 (1), (2); *London and Yorkshire Bank* v. *Belton* (1885), 15 Q. B. D. 457 ; *Masters* v. *Green* (1888), 20 Q. B. D. 807.

[2] 2 Wm. & M., Sess. 1, c. 5, s. 2 ; 11 Geo. II. c. 19, ss. 8, 9.

[3] *Daniel* v. *Stepney* (1874), L. R. 9 Ex. 185. See *In re Roundwood Colliery Co.*, [1897] 1 Ch. 373.

[4] *Rand* v. *Vaughan* (1835), 1 Bing. N. C. 767.

[5] *Tomlinson* v. *Consolidated Credit Corporation* (1889), 24 Q. B. D. 135.

[6] 11 Geo. II. c. 19, ss. 1—3, 7.

[7] *Ib.*, s. 8.

[8] 51 & 52 Vict. c. 21, s. 7. See the Distress for Rent Rules, 1888 ; *Hogarth* v. *Jennings*, [1892] 1 Q. B. 907 ; *Perring* v. *Emmerson*, [1906] 1 K. B. 1. As to cancellation of a certificate, see 58 & 59 Vict. c. 24, s. 1. A penalty of £10 may be incurred by a bailiff acting without such a certificate (s. 2).

[9] *Long* v. *Clarke*, [1894] 1 Q. B. 119.

[10] *Semayne's Case* (1605), 5 Rep. 91 ; 1 Smith L. C., 11th ed., 104.

[11] *Browning* v. *Dann* (1736), Bull. N. P. 81 ; and see the judgment of Bowen, L. J., in *American Mast Corporation* v. *Hendry* (1893), 62 L. J. Q. B. at pp. 389—391 ; and *Hodder* v. *Williams*, [1895] 2 Q. B. 663.

after entering peaceably be forcibly ejected or be refused re-admittance after he has temporarily absented himself (not intending to abandon the distraint), he will be justified in using force to procure re-admission.[1]

A seizure must next be made. Laying hold of a single chattel will be enough to symbolise the seizure of all the goods; so will any words or acts which amount to an expression of an intention to distrain.[2]

At common law a landlord, who had seized goods under a distress, could only impound them and hold them in proper custody, until the arrears of rent and costs were paid;[3] now, however, he can proceed to realise the amount due by selling them. Before doing so, he must serve on the tenant or leave at the chief mansion house,[4] a notice in writing specifying the goods distrained and the cause of distraint.[5] The landlord must allow five days to elapse before he proceeds to sell the goods distrained; this delay is prescribed to give the tenant an opportunity of paying the arrears of rent and costs of the distress and so redeeming his goods. During those five days the landlord must, if the tenant requires it in writing, have the goods valued by an appraiser, or the tenant may require that they should be removed, at his own cost, to a public auction room for sale there.[6] The five days will be extended to fifteen if the tenant makes request in writing to the landlord or bailiff, and gives security for any additional cost occasioned by such extension.[7] During this period the goods are in the custody of the landlord, who is responsible for them.[8]

The sale must be advertised, so that the goods may not be sold far below their proper value. Whether the sale be

[1] See *Bannister* v. *Hyde* (1860), 2 E. & E. 627; *Eldridge* v. *Stacey* (1863), 15 C. B. N. S. 458.

[2] *Hutchins* v. *Scott* (1837), 2 M. & W. 809.

[3] *Jones* v. *Biernstein*, [1899] 1 Q. B. 470.

[4] 2 Wm. & M., Sess. 1, c. 5, s. 1.

[5] Apparently the amount of rent in arrear need not be specified: *Tancred* v. *Leyland* (1851), 16 Q. B. 669.

[6] 51 & 52 Vict. c. 21, s. 5.

[7] *Ib.*, s. 6.

[8] Co. Litt. 47 b. As to animals, see 12 & 13 Vict. c. 92, ss. 5, 6; 17 & 18 Vict. c. 60, s. 1; *Dargan* v. *Davies* (1877), 2 Q. B. D. 118.

private or by auction, the landlord cannot himself make a valid purchase.[1] The bailiff or auctioneer must retain for the use of the tenant any sum by which the proceeds of the sale exceed the amount due for arrears of rent and expenses.[2] If the distress be illegal, excessive or irregular, the tenant has certain rights of action, with which we have already dealt.[3]

*Assignment of Leaseholds.*

A tenant may always assign or underlet the demised premises, unless he is expressly prohibited from so doing by the terms of his lease.[4] The assignment of a lease must be distinguished from an under-lease. An under-lease passes something less than the whole estate of the lessee. The sub-lessee does not hold the same estate as was originally granted to the lessee; hence there is no privity of estate between lessor and sub-lessee. Consequently those covenants in the original lease which "run with the land" neither bind nor benefit the sub-lessee, for by law they are annexed only to the estate originally granted.[5] The landlord has common law rights of distress and re-entry against a sub-lessee, and also the equitable right to enforce against him all restrictive covenants contained in the original lease, of which the sub-lessee may have had actual or constructive notice.[6] The word "assignee" does not necessarily include sub-lessee.[7]

Under the common law a contract could not be assigned. But though a lease is a contract, it creates an estate, and an estate could by the common law be assigned by the act of the parties or by act of law. Any assignment by the landlord of his reversion or by the tenant of his leasehold interest must be made by deed.[8] It is no longer necessary for the tenant to "attorn to" the assignee, that is, to recognise him as his new

[1] See *Moore* v. *Singer Manufacturing Co.*, [1904] 1 K. B. 820.
[2] 2 Wm. & M., Sess. 1, c. 5, s. 2. As to surplus goods, see *Evans* v. *Wright* (1857), 2 H. & N. 527.
[3] *Ante*, pp. 456—458.
[4] *Willmott* v. *London Road Car Co.*, [1910] 1 Ch. 754; *Evans* v. *Lely*, *ib.* 452.
[5] *South of England Dairies, Ltd.* v. *Baker*, [1906] 2 Ch. 631. As to covenants running with the land, see *ante*, pp. 762, 763.
[6] *Hall* v. *Ewin* (1887), 37 Ch. D. 74. As to forfeiture for breach of covenant, see *ante*, pp. 435, 436.
[7] See *Wilson* v. *Twamley*, [1904] 2 K. B. 99; as to 32 Hen. VIII. c. 34, s. 2, see *South of England Dairies, Ltd.* v. *Baker*, *suprà*.
[8] 8 & 9 Vict. c. 106, s. 3.

landlord. But if the tenant pays rent to his former landlord in ignorance of the assignment, he cannot be compelled to pay it over again to the new landlord, even though it fell due after the assignment.[1]

Since an estate was assignable and a contract not, it followed at common law that the covenants contained in the lease did not bind the assignee either of the landlord or of the tenant. To remedy this, the statute of 32 Hen. VIII. c. 34, gave the assignee of the reversion the same rights against the tenant and his assigns as the landlord had ;[2] it also gave the tenant and his assigns the same remedies against the reversioner and his assigns as they would have had against the original landlord.[3]

This statute was construed to refer only to those covenants (relating to the subject-matter of the demise) which are said to "run with the land ;"[4] it does not apply to covenants which do not directly affect the tenancy or its terms, *e.g.*, a covenant giving the tenant an option to purchase.[5] Nor does it apply to leases not made under seal.[6] But section 10 of the Conveyancing Act, 1881,[7] has a wider operation. It enacts that "rent reserved by a lease made since 1881, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in land, and shall be capable of being recovered, received, enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the land leased." Moreover, this section and section 12 of the same Act apply to cases, in which a portion only of the land demised is assigned ; so that now the rent reserved on leases and the benefit of all covenants and conditions relating to the land demised, will on severance of the reversion be apportioned and remain annexed to the several parts of the estate as severed.[8] If the assignee of the term part with his interest, he is liable only for breaches of covenants running with the land, committed while he held, since his liability arose from his connection with the land. During this period the assignee is bound, as regards the lessee, to pay the rent and perform the covenants.[9] This duty of indemnifying the original lessee falls on each successive assignee without any express agreement to that effect, although it is usual to include in every deed of assignment covenants for title and covenants that the assignee shall indemnify the assignor in respect of the performance of all conditions and covenants in the original lease.[10]

[1] See 4 & 5 Anne, c. 16, s. 9.

[2] S. 1. See *Spencer's Case* (1583), 1 Smith L. C., 11th ed., 55, and the notes to it.

[3] S. 2. See also 44 & 45 Vict. c. 41. ss. 10. 11.

[4] *Dewar* v. *Goodman*, [1907] 1 K. B. 612, affirmed [1908] 1 K. B. 94, and [1909] A. C. 72 ; *Chapman* v. *Smith*, [1907] 2 Ch. 97.

[5] *Woodall* v. *Clifton*, [1905] 2 Ch. 257.

[6] See *Manchester Brewery Co.* v. *Coombs*, [1901] 2 Ch. 608.

[7] 44 & 45 Vict. c. 41 ; and see *Turner* v. *Walsh*, [1909] 2 K. B. 484.

[8] *Turner* v. *Walsh*, [1909] 2 K. B. 484. At common law a condition was not apportionable.

[9] *Crouch* v. *Tregonning* (1872), L. R. 7 Ex. 88.

[10] *Moule* v. *Garrett* (1872), L. R. 7 Ex. 101.

Assignments of land in the County of London must be registered under the Land Transfer Acts, 1875 and 1897,[1] where there are at least two lives to fall in, or forty years to run. Assignments of lands in Yorkshire, Middlesex and the Bedford Level come under the various Registry Acts of those districts.[2]

*Disclaimer of the Tenancy.*

An assignment by operation of law takes place on the death or bankruptcy of either the lessor or lessee, and if a landlord be adjudicated a bankrupt, his property passes first to the official receiver and then to the trustee as soon as one is appointed. A tenancy at will is determined as soon as the tenant learns of his landlord's bankruptcy.[3] Where a tenant becomes bankrupt, the lease may expressly provide that this fact shall determine the tenancy or give a right of re-entry. Otherwise the tenant's interest passes to his trustee in bankruptcy. If to this interest onerous covenants are attached, the trustee has power to disclaim the property; but he cannot do so as to part only of the demised premises.[4] The disclaimer must be in writing and signed by the trustee; in some cases the leave of the Bankruptcy Court must first be obtained.[5] He must disclaim within twelve months from his appointment, or within twelve months of his learning of the existence of the lease;[6] but such period may be extended by the Court.[7] This limitation, however, only applies where there is no notice served by any person interested[8] calling on the trustee to decide whether he will disclaim or not; if such a notice be served on him, he must disclaim within twenty-eight days after he receives it or within such extended time as the Court may allow.[9] A trustee who disclaims is freed from all personal liability; if he does not disclaim, he stands in the position of an assignee.

[1] And see Land Transfer Rules, 1903, rr. 68, 69.
[2] See 47 & 48 Vict. c. 54; 7 Anne, c. 20 (and 54 Vict. c. 10); 15 Car. II. c. 17.
[3] *Doe* d. *Davies* v. *Thomas* (1851), 6 Exch. 854.
[4] *Ex parte Allen, In re Fussell* (1882), 20 Ch. D. 341.
[5] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 55 (3); and see Bankruptcy Rules, 1890, r. 69.
[6] *In re Cohen*, [1905] 2 K. B. 704.
[7] 46 & 47 Vict. c. 52, s. 55 (1), as amended by 53 & 54 Vict. c. 71, s. 13.
[8] This includes the landlord: *In re Page* (1884), 14 Q. B. D. 401.
[9] 46 & 47 Vict. c. 52, s. 55 (4); *Ex parte Lovering, In re Jones* (1874), L. R. 9 Ch. 586.

The effect of the disclaimer only extends so far as is necessary to release the bankrupt and trustee from liability, and does not otherwise affect the rights or liabilities of third parties in relation to the property disclaimed.[1] Thus, if the bankrupt be an assignee, the original lessee remains liable;[2] if he be an original lessee who has sublet the premises, the under-lessee cannot be ejected so long as he observes the covenants in the original lease; he can be distrained upon or ejected if he fails to pay the rent thereby reserved.[3]

### *Termination of Lease.*

A lease for a fixed period or a term of years, or until a certain event happens, terminates at the expiration of the period or term of years or on the happening of the event. If the lease be determinable at the option of one of the parties, he must give reasonable notice (where no period is fixed by the lease) of his intention to determine it.

As soon as the reversion and the term both vest in the same person in the same right, the term becomes merged in the reversion and so ceases to exist.[4]

A tenancy may also terminate by surrender, that is by the tenant rendering up the estate to his immediate landlord. Surrenders are either by the act of the parties or by operation of law.

The Statute of Frauds enacts that an express surrender shall be by deed or note in writing;[5] and the Real Property Amendment Act, 1845, requires that "a surrender in writing, unless of a copyhold interest or any interest which might by law have been created without writing, shall be by deed."[6]

[1] *Ex parte Walton, In re Lery* (1881), 17 Ch. D. 746; *Ex parte East and West India Dock Co., In re Clarke, ib.*, 759; *Harding* v. *Preece* (1882), 9 Q. B. D. 281; and see the remarks of Romer, L. J., in *Stein* v. *Pope*, [1902] 1 K. B. at p. 599.

[2] *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448; *Stacey* v. *Hill*, [1901] 1 K. B. 660.

[3] *Ex parte Walton, In re Lery, supra.*

[4] *Chambers* v. *Kingham* (1878), 10 Ch. D. 743; and see *In re Radcliffe, Radcliffe* v. *Bewes*, [1892] 1 Ch. 227; *In re Hole*, [1906] 1 Ch. 673.

[5] 29 Car. II. c. 3, s. 3.

[6] 8 & 9 Vict. c. 106, s. 3. See *Doe* v. *Thomas* (1829), 9 B. & C. 288. But see *Fenner* v. *Blake*, [1900] 1 Q. B. 426, where a kind of estoppel seems to dispense with a deed.

A surrender may be partial (not extending to the whole of the premises)[1] or conditional.[2] If one of the parties by his acts puts himself into a position which is inconsistent with the continuation of the lease and the other party assents thereto, then the law infers a surrender of the lease. Where the tenant holding under one lease consents to the granting of a new lease, he is estopped from denying the landlord's title to grant it, and as this implies the non-existence of any previous lease, the former lease is surrendered by operation of law.[3] The same principle holds good where there is any new relationship created between the parties inconsistent with that of landlord and tenant. For instance, where the lessee of a ferry became a servant and accounted for the profits, a surrender by operation of law was held to have taken place.[4] So also if the lessee has accepted a new lease,[5] or if the tenant has quitted the premises and the landlord has taken possession of them,[6] not merely for a temporary purpose such as repairing, but under such circumstances as to show a clear assent to the abandonment of the premises by the tenant.[7] Where, however, there is a change in the personality of the tenant, there is no surrender by operation of law unless the old tenant gives up possession to the new tenant at or about the time of the grant of the new lease to which he assents.[8]

On the surrender of a lease the tenant remains liable for breaches of covenant and for rent up to the day on which the surrender takes effect.[9] If he has sublet the premises the under-tenant, when the lease is merged, still remains liable under his lease or tenancy.[10]

If the tenant either asserts a title to the property in another or claims it himself,[11] or insists on any claim inconsistent with the relationship of landlord and tenant,[12] he is said to disclaim. For example, a denial by a yearly tenant of his landlord's right to raise the rent will amount to a disclaimer;[13] so, apparently, will a claim to the possession of the title deeds,[14] but a mere refusal to pay rent until the true owner of the premises be ascertained will not.[11] In the case

[1] *Holme* v. *Brunskill* (1878), 3 Q. B. D. 495.
[2] *Coupland* v. *Maynard* (1810), 12 East, 134.
[3] *Lyon* v. *Reed* (1844), 13 M. & W. 285.
[4] *Peter* v. *Kendal* (1827), 6 B. & C. 703.
[5] *Knight* v. *Williams*, [1901] 1 Ch. 256; but, as to where a third party has accepted a new lease, see *Wallis* v. *Hands*, [1893] 2 Ch. 75.
[6] *Nickells* v. *Atherstone* (1847), 10 Q. B. 944.
[7] *Moss* v. *James* (1878), 47 L. J. Q. B. 160.
[8] *Wallis* v. *Hands*, [1893] 2 Ch. 75.
[9] *Att.-Gen.* v. *Cox* (1850), 3 H. L. Cas. 240; *Shaw* v. *Lomas* (1888), 59 L. T. 477; and see 33 & 34 Vict. c. 35.
[10] *Mellor* v. *Watkins* (1874), L. R. 9 Q. B. 400. See Co. Litt. 338 b; 8 & 9 Vict. c. 106, s. 9.
[11] *Jones* v. *Mills* (1861), 10 C. B. N. S. 788.
[12] *Doe* v. *Rollings* (1847), 4 C. B. 188.
[13] *Vivian* v. *Moat* (1881), 16 Ch. D. 730.
[14] *Doe* v. *Price* (1832), 9 Bing. 356.

of a tenant for a term of years mere verbal disclaimer will not operate as a forfeiture.[1]

If a lease be granted on a condition which is subsequently broken, the landlord may re-enter although there is no covenant for re-entry in the lease. The landlord has no right to re-enter for a breach of covenant unless the lease contains an express proviso for re-entry.[2] A proviso for re-entry must be construed strictly and will not be enforced unless it clearly includes the breach of covenant complained of.[3] We have discussed the right of the landlord to re-enter for a forfeiture and the tenant's right to relief, in a former chapter.[4]

In the case of a tenancy from year to year, a half-year's notice to quit is necessary from either party to the other, and the notice must expire at the end of a current year.[5] But in the case of a tenancy to which the Agricultural Holdings Act, 1908, applies, a year's notice expiring with a year of tenancy is required in the absence of a written agreement to the contrary. Under this Act a landlord may give a tenant from year to year notice to quit a part only of his holding, if the notice is given with a view to use the land for any of the improvement purposes mentioned in the Act.[6] The notice, which should be clear in all its terms,[7] should be given by the landlord or his agent[8] either to the tenant personally or left at his house, its nature and contents being at the time explained to his servant or some member of his family.[9] Where the notice is served on the tenant personally, no explanation is necessary.[10] The notice to quit must be so

[1] *Doe* v. *Wells* (1839), 10 A. & E. 427.
[2] *Doe* v. *Phillips* (1824), 2 Bing. 13.
[3] *Croft* v. *Lumley* (1858), 6 H. L. Cas. 672; and see *Harman* v. *Ainslie*, [1904] 1 K. B. 698.
[4] See Book III., Chap. III.; and as to the procedure, Book V., Chap. XIX.
[5] See *Dixon* v. *Bradford and District, &c., Coal Supply Co.*, [1904] 1 K. B. 444.
[6] 8 Edw. VII. c. 28, ss. 22, 23.
[7] *Doe* v. *Wilkinson* (1840), 12 A. & E. 743; *Gardner* v. *Ingram* (1889), 61 L. T. 729.
[8] *Doe* v. *Mizen* (1837), 2 M. & Rob. 56; *Jones* v. *Phipps* (1868), L. R. 3 Q. B. 567; see also *Wordsley Brewery Co.* v. *Halford* (1903), 90 L. T. 89.
[9] *Jones* v. *Marsh* (1791) 4 T. R. 464; *Tanham* v. *Nicholson* (1872), L. R. 5 H. L. 561. For service of notice under the Agricultural Holdings Acts, see *Van Grutten* v. *Trevenen*, [1902] 2 K. B. 82.
[10] *Liddy* v. *Kennedy* (1871), L. R. 5 H. L. 134.

expressed as to expire on and with the last day of the current period of the tenancy.

In cases where a half-year's notice is enough, any two quarters of the year are deemed to amount to a half-year, whatever may be the exact number of days included in those two quarters. Thus, if the tenancy commenced at Lady Day, notice on the 29th of September to quit on the following Lady Day is good.[1] Where the tenancy began at Michaelmas, notice served on the 26th of March is not a valid notice.[2]

A yearly tenancy usually expires on the same day of the year as it commenced, but if the tenancy commence between the usual quarter days, and rent be paid for a portion of the quarter and thenceforward on the usual quarter days, the tenancy for the purpose of notice to quit is deemed to have commenced on the quarter day next succeeding the day of entry.[3]

In cases of tenancies for shorter periods than one year, such as lodger tenancies, there is no fixed rule as to the length of notice; it must be a matter of express contract or governed by usage.[4] But even in the case of a weekly tenancy, some notice is necessary.[5] A tenancy at will is determined at the will or death of either party;[6] the will may be either expressed or implied from the doing of any act inconsistent with the existence of the tenancy, such as the tenant committing voluntary waste, or executing an assignment of his interest,[7] or the landlord granting a lease[7]— in the last two cases as soon as knowledge thereof reaches the other party.[8]

On the determination of the tenancy the rights of the tenant to the fruits of his labour depend on the nature of the tenancy, and in some cases on the mode of its ending.

In the case of all tenancies determinable at an uncertain time, that is, at a period which does not depend on the will of the tenant, and upon which he cannot calculate, the tenant

[1] *Roe* d. *Durant* v. *Doe* (1830), 6 Bing. 574; *Doe* d. *Matthewson* v. *Wrightman* (1801), 4 Esp. 5; *Doe* d. *Harrop* v. *Green* (1802), *ib.* 198.
[2] *Morgan* v. *Davies* (1878), 3 C. P. D. 260.
[3] *Sandill* v. *Franklin* (1875), L. R. 10 C. P. 377; and see *Sidebotham* v. *Holland*, [1895] 1 Q. B. 378.
[4] *Jones* v. *Mills* (1861), 10 C. B. N. S. 788.
[5] *Bowen* v. *Anderson*, [1894] 1 Q. B. 164; *Weston* v. *Fidler* (1903), 88 L. T. 769.
[6] *Doe* d. *Price* v. *Price* (1832), 9 Bing. 356; *Turner* v. *Doe* d. *Bennett* (1842), 9 M. & W. 643, 646.
[7] *Pinhorn* v. *Souster* (1853), 8 Exch. 763.
[8] *Ib.*; and see *Doe* v. *Thomas* (1851), 6 Exch. 854.

had at common law a right to "emblements," that is, to enter, take and carry away the profits of his own labour on the land. Under this rule the late tenant can claim all crops which are the result of his own labour, and which are, in the ordinary course of husbandry, produced and marketable within the year, such as corn, turnips, carrots, hemp, flax, hops, potatoes and the like.[1]

Since 1845, however, in case of tenancies at a rack rent, the tenant, in lieu of claiming emblements, is allowed to continue in occupation till the end of the current year of the tenancy and to get in such crops himself, paying rent at the same rate till he quits.[2] Where, however, the tenancy was of such a nature that its end could always be foreseen and calculated on by the tenant, he has no right to emblements. But in some counties there is a local custom which entitles such a tenant, in the absence of any express agreement to the contrary, to take "away-going" crops, tillages, &c.[3]

*Fixtures.*

A "fixture" formerly meant any chattel which on becoming affixed to the soil became part of the realty. The term "fixtures" now has come to mean those things which form an exception to the above rule, and which may be removed by the person who affixed them to the soil.[4] Fixtures may, as between landlord and tenant, be divided into three classes:—

(i.) ornamental or domestic fixtures,

(ii.) trade fixtures, and

(iii.) agricultural fixtures.

(i.) In the case of ornamental and domestic fixtures, the chattel must have been affixed by the tenant, and be of an ornamental character, or for domestic convenience; it must

[1] *Graves* v. *Weld* (1833), 5 B. & Ad. 105.

[2] 14 & 15 Vict. c. 25, s. 1.

[3] *Wigglesworth* v. *Dallison* (1779), 1 Smith L. C., 11th. ed., 545, and cases there cited; *Hutton* v. *Warren* (1836), 1 M. & W. 466; and *ante*, pp. 78, 79.

[4] *Climie* v. *Wood* (1869), L. R. 4 Ex. 328; and see *Holland* v. *Hodgson* (1872), L. R. 7 C. P. 328.

be capable of being removed entire and must be slightly affixed.

The right of the tenant to remove such ornamental or domestic fixtures must be exercised during the tenancy. He may deprive himself of this right by express covenant; as, for instance, if he undertake to "yield up" in good repair all improvements and fixtures.[1] On the other hand, he may so contract as to enlarge his right of removal.[2] The right of removal is lost as soon as the tenant ceases to be such, and becomes a "trespasser."[3] It exists so long as his term lasts, or afterwards provided he holds under such circumstances that he is still considered a tenant. A person claiming under the tenant may, apparently, have more time for the removal of fixtures than the tenant himself.[4]

Such things as grates, ornamental chimney-pieces, wainscots fastened with screws, coppers, &c., are all ornamental or domestic fixtures. An outgoing tenant may remove an ornamental chimney-piece put up by himself during the tenancy, but not a plain chimney-piece, though made of marble, nor has he any right to remove pillars of brick and mortar built on a dairy floor to hold pans, although such pillars are not let into the ground.[5]

Window-sashes, which are merely fastened by laths nailed across the frames to prevent their falling out, are not fixed to the freehold and are therefore removable by the tenant.[6] Similarly such articles as cornices, bookcases, and such like furniture fixed by screws to the wall, bells, and iron backs to chimneys, are all tenant's fixtures. But a tenant who is not a gardener by trade cannot remove an ornamental border of box, planted by himself on the demised premises, unless by special agreement with his landlord.[7]

Where a lease is disclaimed by a trustee in bankruptcy under the Bankruptcy Act, 1883, the Court, when granting leave to disclaim, makes "such orders with respect to fixtures, tenant's improvements and other matters arising out of the tenancy, as the Court thinks just."[8]

(ii.) The right of a tenant, who is carrying on a trade on

[1] As to the effect of a covenant specifying certain fixtures and then using "general words," see *Lambourn* v. *McLellan*, [1903] 2 Ch. 268.
[2] *London and South African Exploration Co.* v. *De Beers Co.*, [1895] A. C. 451.
[3] *Pugh* v. *Arton* (1869), L. R. 8 Eq. 626.
[4] See *In re Glasdir Copper Works, Ltd.*, [1904] 1 Ch. 819.
[5] *Bishop* v. *Elliott* (1855), 11 Exch. 113.
[6] *R.* v. *Hedges* (1779), 1 Leach, 201.
[7] *Empson* v. *Soden* (1833), 4 B. & Ad. 655.
[8] 46 & 47 Vict. c. 52, s. 55 (3); and see *Horn* v. *Baker* (1808), 2 Smith L. C., 11th ed., 232, and *ante*, pp. 890, 891.

the demised premises, is wider than that of an ordinary tenant. He may remove any fixture which was erected for the purposes of his trade, provided it can be removed without being itself destroyed and without injuring the land or building.[1]

As examples of trade fixtures we have colliery machinery, including fire and steam engines, soap-boilers' vats, furnaces, brewing vessels, bakers' ovens, an engine and boiler (the former being screwed to planks, the latter fixed in brickwork) salt-pans fixed to a brick floor with mortar; also buildings, if they are merely accessory to machinery, green-houses built by a nurseryman for his business, or trees planted by him for the purposes of his trade, but he may not cut down those which have actually taken root, nor remove vines planted for fruit bearing. At common law a tenant could not cut down, remove or be compensated for leaving, orchard trees.[2] Market-gardeners may now remove glass-houses and other buildings erected for trade purposes, with the same privileges as those given to agricultural tenants.[3]

(iii.) The common law rules as to "agricultural fixtures" were less favourable to tenants than the rules as to trade fixtures.[4] The matter was dealt with by the Landlord and Tenant Act, 1851,[5] and the Agricultural Holdings Acts, 1875 and 1883.[6] It is now governed by the Agricultural Holdings Act, 1908,[7] in respect of all agricultural and pastoral holdings.

These Acts do not extend to a tenancy at will, or to one for a less period than one year.[8] Except in the case of manuring, however, compensation cannot be recovered for improvements executed during the last year of a tenancy, unless the landlord has assented to them or failed to object for a month after having received notice from the tenant of his intention to begin such improvement. But a tenant

[1] See *Climie* v. *Wood* (1869), L. R. 4 Ex. 328; *Wake* v. *Hall* (1880), 8 App. Cas. 195.

[2] *Per* Cozens-Hardy, J., in *Mears* v. *Callender*, [1901] 2 Ch. at p. 395.

[3] 8 Edw. VII. c. 28, s. 42.

[4] See *Elwes* v. *Maw* (1862), 2 Smith, L. C., 11th ed., 189, and the notes to it.

[5] 14 & 15 Vict. c. 25.

[6] 38 & 39 Vict. c. 92; 46 & 47 Vict. c. 61.

[7] Unless the fixture or building existed prior to January 1, 1884: 8 Edw. VII. c. 28, s. 21 (2). As to holdings of not more than two acres, see Allotments and Cottage Gardens Act, 1887 (50 & 51 Vict. c. 26), as amended by the Small Holdings Act, 1908 (8 Edw. VII. c. 36), s. 47 (3). As to market gardens, see 8 Edw. VII. c. 28, s. 42.

[8] See the definition of "contract of tenancy," 8 Edw. VII. c. 28, s. 48 (1).

from year to year may recover for any improvements made by him during the last year of his tenancy before he receive notice to quit, provided he gives up his holding in due course in pursuance of such notice.[1]

The improvements under this Act are divided into three classes.[2] The first comprises the erection, alteration or enlargement of buildings; making and improving pasture, gardens, water meadows, roads and bridges; water-courses and works for supplying water, planting osier beds, hops, orchards, and reclamation of waste land, and a few minor matters. The second class consists of drainage; the third of liming, chalking, claying, clay-burning and marling land, consuming on the holding feeding-stuff not produced thereon and purchased manure, laying down temporary pasture and making necessary repairs to buildings, which the landlord has failed to do within a reasonable time after receiving written notice.

In respect of these three classes, the tenant is entitled, on quitting at the termination of his tenancy, to obtain from the landlord compensation estimated at such an amount as fairly represents the value of the improvements to an incoming tenant.[3]

As to improvements of the first class, the consent in writing of the landlord is required.[4] As to those of the second class, the tenant must give the landlord from two to three months' written notice of the intended improvements, and of the manner in which he proposes to carry them out. The parties may then agree as to what the compensation shall be. Failing such an arrangement, the landlord may execute the improvements himself and charge the tenant £5 *per cent. per annum* on the outlay; or he may recover the amount by a charge, recoverable as rent, which would form a sinking fund and pay off the charge in twenty-five years, based on a rate of interest of £3 *per cent. per annum*. If the landlord does not execute the improvements within a reasonable time, the tenant may do so and claim compensation for them. It is also open to the parties to come to an arrangement between themselves as to improvements of this class, and so dispense with the necessity of notice.[5] In the case of improvements of the third class, the consent of the landlord is not required, nor need any notice be given by the tenant. It is provided that if fair and reasonable compensation be provided for by written agreement, such compensation shall be substituted for compensation under the Act.[6]

The landlord may set off any benefit which he allowed the tenant in consideration of the tenant executing the improvements, and the value of manure that would have been produced by consumption on the premises of

[1] 8 Edw. VII. c. 28, s. 9.
[2] See First Schedule.
[3] *Ib.*, s. 1.
[4] *Ib.*, s. 2.
[5] *Ib.*, s. 3.
[6] *Ib.*, s. 4.

any crops removed during the last two years of the tenancy[1] and any sums due for waste or breach of covenant by the tenant.[2]

When the landlord desires to make certain kinds of improvements specified in the Act, such as making roads, building cottages, opening mines, &c., he may give notice to quit as to a part of the holding, which the tenant may accept by written notice within twenty-eight days as a notice to quit for the entire holding. Should he not do this, he becomes entitled to a reduction in his rent, which is to be settled by agreement or by reference without appeal.[3] Where a tenant affixes any engine, machinery, fencing or other fixture, or erects, under certain conditions, any building, such becomes his property and may be removed by him on quitting his holding, provided he gives the landlord a month's written notice, pays all rent and discharges all obligations, does not do any avoidable damage by removal and makes good any damage so caused. The landlord may elect, before the expiration of the notice, to purchase the fixture at a price which represents its fair value to an incoming tenant. This section does not apply to any fixture or building affixed or erected before 1884.[4]

The Act, which came into operation on January 1st, 1909, also gives compensation to tenants where damage has been done by game.[5] Further a landlord, who without good cause and for reasons inconsistent with good estate management turns out his tenant by notice to quit or refusal to renew or demand of higher rent in the circumstances specified by the Act, must compensate the tenant for loss unavoidably incurred by the sale or removal of his goods or household stock.[6]

The Small Holdings and Allotments Act, 1907,[7] which aims at increasing the number of agricultural tenants by giving county councils the right to acquire land compulsorily for letting in small holdings, also makes provision for the compensation of agricultural tenants for the improvements which they have made during their tenancy.[8]

*Remedies at Law.*

In addition to his power of distress, the landlord may bring an action to recover his rent, or the residue that the distress

[1] 8 Edw. VII. c. 28, s. 1 (2).
[2] *Ib.*, s. 6 (3).
[3] *Ib.*, s. 23.
[4] *Ib.*, s. 21 (1).
[5] *Ib.*, s. 10.
[6] *Ib.*, s. 11.
[7] 7 Edw. VII. c. 54.
[8] See s. 35.

did not satisfy. Where a lease is not by deed, the landlord can only recover arrears of rent for six years;[1] where the lease is by deed he may sue on the tenant's covenant for twenty years' arrears.[2] A landlord can also sue for "use and occupation,"[3] in cases where there is no actual contract of tenancy, but actual occupation coupled with an express or implied undertaking to pay for it.[4] A corporation may thus sue and be sued,[5] although there be no contract under seal.[6]

In the letting of a furnished house, however, there is, as we have seen,[7] an implied condition that the house is fit for habitation; should this not be so, the tenant may give up possession of the house and furniture, and sue on the breach of contract.[8] There is, however, no implied promise that the furnished house shall continue fit for habitation throughout the term.[9] On the breach of a covenant for quiet enjoyment, the tenant is relieved from liability to pay rent;[10] if there be no eviction he can sue for nominal damages and also for any actual damage which he may have sustained;[11] if he be evicted, he may recover, in addition to the damage sustained, the value of the unexpired residue of the term.[12]

The landlord may sue for damages for injury to the reversion arising from the tenant's breach of the covenant to repair; or he may re-enter for forfeiture if there be a clause in the lease to that effect, and if he has given a proper notice within section 14 of the Conveyancing Act, 1881.[13] Even then, the Court may, as we have seen, grant relief to the tenant.[14]

[1] 3 & 4 Wm. IV. c. 27, s. 42.
[2] 3 & 4 Wm. IV. c. 42, s. 3. See *In re Jolly*, [1900] 2 Ch. 616.
[3] Both at common law and under the statute 11 Geo. II. c. 19, s. 14.
[4] *Churchward* v. *Ford* (1857), 2 H. & N. 446.
[5] *Lowe* v. *L. & N. W. Ry. Co.* (1852), 18 Q. B. 632.
[6] *Mayor of Thetford* v. *Tyler* (1845), 8 Q. B. 95.
[7] *Ante*, p. 874.
[8] *Smith* v. *Marrable* (1843), 11 M. & W. 5; *Wilson* v. *Finch Hatton* (1877), 2 Ex. D. 336.
[9] *Sarson* v. *Roberts*, [1895] 2 Q. B. 395, but see as to workmen's dwellings the Housing, &c., Act, 1909 (9 Edw. VII. c. 44), ss. 14, 15 (1).
[10] *Morrison* v. *Chadwick* (1849), 7 C. B. 266.
[11] *Child* v. *Stenning* (1879), 11 Ch. D. 82; *Windsor, &c., Ry. Co.* v. *The Queen and Western Counties Ry. Co.* (1886), 11 App. Cas. 607.
[12] *Grosvenor Hotel Co.* v. *Hamilton*, [1894] 2 Q. B. 836.
[13] 44 & 45 Vict. c. 41; *Morgan* v. *Hardy* (1886), 17 Q. B. D. 770; and see *Conquest* v. *Ebbetts*, [1896] A. C. 490. As to injury done to the reversion after the term has expired, see *Joyner* v. *Weeks*, [1891] 2 Q. B. 31; *Henderson* v. *Thorn*, [1893] 2 Q. B. 164.
[14] *Ante*, p. 435.

Similarly, an action will lie against a tenant who has committed waste, both for an injunction and for damages. In such an action the measure of damages is not so much the outlay necessary to restore the premises, as the diminution in the value of the reversionary interest, less a discount for immediate payment.[1] An injunction may be obtained against acts amounting to breaches of covenant to cultivate in a husband-like manner,[2] but a mandatory injunction will not be granted to compel the lessee to cultivate in the manner prescribed by his lease.[3]

Where a tenant for "any term of life, lives or years" wilfully holds over any lands or tenements after the determination of such terms, and "after a demand made and notice in writing given" by the landlord or his duly authorised agent for delivering the possession of them, he becomes liable to the landlord for double the annual value of the holding, which is to be recovered by action.[4] Where the tenant gives notice to quit on a specified date and nevertheless continues in possession after that date, he is liable for double rent.[5]

Double value cannot be recovered by distress, but double rent may be recovered either by distress or action. In both cases the action may be brought in the county court if the amount claimed does not exceed £100.[6]

The tenant, on the other hand, can of course sue the landlord for the breach of any covenant to be performed on his part. But a breach of covenant by the landlord will not, as a rule, entitle the tenant to throw up the lease and quit the premises.

[1] *Whitham* v. *Kershaw* (1885), 16 Q. B. D. 613.
[2] *Crosse* v. *Duckers* (1873), 27 L. T. 816; *Phipps* v. *Jackson* (1887), 56 L. J. Ch. 550.
[3] *Musgrave* v. *Horner* (1875), 31 L. T. 632.
[4] 4 Geo. II. c. 28, s. 1.
[5] 11 Geo. II. c. 19, s. 18; *Johnstone* v. *Hudlestone* (1825), 4 B. & C. 922, 935.
[6] And generally as to the procedure in an action brought by a landlord to recover possession of the demised premises, see Book V., Chap. XIX.

## Chapter XIV.

### CARRIAGE OF GOODS BY SEA.

In early times, if a trader had goods which he wished to send to a foreign market, he generally built himself or bought a ship for their conveyance ; in later times he more usually hired a ship from someone else, placed his own master and crew on board, and thus became practically the owner of the vessel during the period for which it was let to him. In neither of these cases, therefore, was there any necessity for drawing up any contract with reference to the cargo, unless he thought fit to take on board the goods of any other trader, in which case he became liable as a bailee for hire. In the present day, however, a merchant seldom hires a ship for a term of years or for any long period of time. He may hire a ship, or a certain portion of a ship, for his exclusive use on a definite voyage or for a short period, the master and the crew being both engaged and paid by the shipowner. Or he may merely place his goods on board a ship, which is practically doing the work of a common carrier, calling at many ports, discharging and receiving goods belonging to different merchants ; such a ship is called a "general ship." The distinction between these two cases closely resembles that which exists between hiring a cab and taking a seat in a public omnibus.

There are, therefore, two distinct kinds of "contracts of affreightment," as they are called :—

(i.) Contracts by charter-party.

(ii.) Contracts for the conveyance of goods in a general ship.

(i.) By a contract of charter-party an entire ship, or some principal part of it, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. The

contract may be (*a*) a "voyage charter," *i.e.*, an agreement to carry goods on a defined voyage; or (*b*) a "time charter," under which the ship is at the disposal of the charterer for a specified time.

A charter-party may be made in any form which the parties choose to adopt, and even by word of mouth.[1] Particular trades often have special forms. The Stamp Act, 1891, requires that charter-parties be stamped with a sixpenny stamp.[2]

A charter-party usually contains various provisions, which have different degrees of importance. There may be misdescriptions which, although untrue, give no cause of action. There may be collateral or independent agreements which, if broken, will be good ground for an action for damages, but which will not justify repudiation of the contract. Lastly, there may be provisions of primary importance, which are intended to be a substantive part of the contract and which amount to conditions precedent; the breach of any such provision will entitle the other party to repudiate and rescind the contract, *e.g.*, will entitle the shipowner to refuse to let the charterer have his ship, or the charterer to refuse to load his cargo.

Honest misdescriptions do not give a cause of action, but if the misdescription is very gross it may be evidence of fraud. "Whether a descriptive statement in a written instrument is a mere representation or whether it is a substantive part of the contract, is a question of construction which the Court, and not a jury, must determine."[3] Thus, a provision that a ship is "now in the port of Amsterdam,"[4] or that a ship shall "sail on or before a certain day,"[5] or be ready to receive a cargo during a certain time,[6] is one which amounts to a condition precedent, and the breach of it will release the charterer.

But "unless the non-performance alleged in the breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for

[1] *Rederi Aktiebolaget Nordstjernan* v. *Salvesen* (1903), 6 F. 64; [1905] A. C. 302.
[2] 54 & 55 Vict. c. 39, ss. 49—51.
[3] *Per* Williams, J., in *Behn* v. *Burness* (1863), 32 L. J. Q. B. at p. 205.
[4] *Behn* v. *Burness*, *suprà*.
[5] *Glaholm* v. *Hays* (1841), 2 Man. & G. 257.
[6] *Oliver* v. *Fielden* (1849), 4 Exch. 135.

the breach of which the party injured may be compensated in damages."[1] So a stipulation that a ship shall sail "in a reasonable time" or with all convenient speed may be merely a collateral agreement, the breach of which would not justify the freighter in refusing to load.[2]

The shipowner must provide a vessel which is seaworthy for the particular cargo,[3] and fit to receive it at the time of loading.[4] These are implied conditions precedent. If the ship is not in existence, there is no contract.[5] The shipowner also impliedly warrants that he will begin and carry out the voyage with reasonable despatch, and that the ship shall not deviate from the ordinary commercial route without justification, such as for the purpose of saving life.

(ii.) When the owner of a ship contracts with several different merchants to convey their goods to the place of destination, the contract is said to be for conveyance in a general ship. The master generally makes the contract on behalf of the owner of the ship; he gives to each merchant who sends goods on board his vessel a document called a "bill of lading," which is in fact a receipt for those goods. Such a document must, at the time when it is executed, bear a sixpenny stamp.[6] It states or incorporates the terms of the contract by which the shipowner agrees to carry the goods, and specifies the rate at which he is to be paid for carrying them.

A bill of lading differs from a charter-party in the following respects:—

(*a*) A charter-party is a contract between the shipowner and a charterer: a bill of lading is a contract between the shipowner or charterer and the shipper of the goods;

(*b*) A bill of lading operates as a receipt for the goods shipped: a charter-party does not;

(*c*) A bill of lading is a negotiable instrument (though not in the strict sense of the word "negotiability" when used

[1] *Per* Lord Ellenborough, C. J., in *Davidson* v. *Gwynne* (1810), 12 East, at p. 389.
[2] *Tarrabochia* v. *Hickie* (1856), 1 H. & N. 183.
[3] *Stanton* v. *Richardson* (1874), L. R. 9 C. P. 390; *Tattersall* v. *National Steamship Co.* (1884), 12 Q. B. D. 297.
[4] *McFadden* v. *Blue Star Line*, [1905] 1 K. B. 697.
[5] *Couturier* v. *Hastie* (1852), 25 L. J. Ex. 253; (1856), 5 H. L. Cas. 673.
[6] 54 & 55 Vict. c. 39, s. 40.

in connection with a bill of exchange), whereas a charter-party is not negotiable in any way;

(*d*) A bill of lading is a document of title to the goods comprised in it: a charter-party merely gives the charterer a right to the use of the ship for a limited period.

Although by mercantile usage a bill of lading has now come to be a symbol of the right of property in the goods, its primary office and purpose is to express the terms of the contract under which the goods are shipped.[1] It is the best evidence of these terms; consequently it cannot be afterwards varied by evidence of another arrangement between the parties,[2] unless it is obviously incomplete or it refers to provisions in a particular form of bill of lading.[3] A bill of lading, however, was not at common law conclusive as to the quantity or quality of the goods shipped. But the Bills of Lading Act, 1855,[4] enacts that every bill of lading in the hands of a consignee or indorsee for value shall be conclusive evidence as against the master or other person signing it, even though the goods had wholly or partly not been shipped as stated, unless the holder of the bill of lading had actual notice of this fact at the time he received the bill. It is now conclusive, therefore, against a person actually signing it or a person in whose name and with whose authority it is signed, but against no one else.[5]

A bill of lading is also a document of title and negotiable as such; it is transferable by indorsement. A transfer of the bill of lading will pass the property in the goods, and the bill will cease to be in force as soon as complete delivery of possession of the goods has been made to some person having a right to claim them under it.[6]

"A cargo at sea . . . is necessarily incapable of physical delivery. During this period of transit and voyage the bill of lading by the law merchant is

[1] See the judgment of Blackburn, J., in *Fraser* v. *Telegraph Construction Co.* (1872), L. R. 7 Q. B. at p. 571.
[2] *Leduc* v. *Ward* (1888), 20 Q. B. D. 475, 479.
[3] *The Canada* (1897), 13 Times L. R. 238.
[4] 18 & 19 Vict. c. 111, s. 3.
[5] *Brown* v. *Powell Coal Co.* (1875), L. R. 10 C. P. 562.
[6] See the judgment of Willes, J., in *Meyerstein* v. *Barber* (1866), L. R. 2 C. P. at p. 53.

universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading wherever it is the intention of the parties that the property shall pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods, and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which, in the hands of a rightful owner, is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."[1]

A bill of lading is not a negotiable instrument in the full sense of that term; for a holder, into whose hands it came without any just title, can acquire no property in the goods. The possession of a bill of lading cannot have greater force than the actual possession of the goods. The holder in due course of a bill of exchange has a good title, even though he received the bill from a thief; but the holder of a bill of lading for stolen goods acquires no property in them.[2]

An unpaid seller of goods, while still in possession of them, has a common law lien for the price. If he has parted with the possession, he may, so long as the goods are in transit, stop them if he hears that the buyer is insolvent. He exercises this right of "stoppage *in transitu*" by giving notice to the carrier, and can then re-sell the goods. But he has no right to stop them as against an indorsee of the bill of lading, who took it *bonâ fide* and for value.[3]

Though the custom of merchants at an early date made a bill of lading transferable by indorsement so as to pass the property in the goods to the indorsee, it was not until 1855 that such an indorsement transferred to the indorsee the contractual rights and liabilities under the bill.[4] The

[1] *Per* Bowen, L. J., in *Sanders* v. *Maclean* (1883), 11 Q. B. D. at p. 341.
[2] See the judgment of Lord Loughborough in *Lickbarrow* v. *Mason* (1787), 1 Smith, L.C., 11th ed., at pp. 710, 711.
[3] See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), ss. 47, 48, set out *ante*, pp. 799, 800.
[4] Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1.

transferee can now sue and be sued in his own name upon the contract. Where the agreement is for carriage in a general ship, the only contract between the parties is the bill of lading. In other cases both a charter-party and a bill of lading are generally drawn up, and the contractual rights and liabilities of the parties depend, of course, upon the precise language of these documents.

At common law the shipowner is not liable to the charterer or to the holder of the bill of lading for any loss or damage occasioned to the goods by—

(*a*) The act of God.[1]

(*b*) The act of the "King's enemies." This phrase covers pirates[2] and foreign belligerents, but not rebels.

(*c*) Inherent vice in the goods themselves.[3]

(*d*) Negligence on the part of the owner of the goods, which conduced to the loss or damage of which he now complains.

But it is usual to extend the exemption of the shipowner from liability by a special clause in the bill of lading to the effect that the shipowner is not to be liable for the act of God, the King's enemies, fire or shipwreck if without his actual fault, nor for the default or incapacity of any pilot whom he is compelled by law to take on board, nor for felonious embezzling or secreting of gold, silver, jewels and precious stones by his servants or a stranger, unless their true nature and value be declared in writing to him or his master at the time when they were shipped on board. In all other respects he is an insurer of the goods, like a common carrier.[4]

The earliest reported case on this subject is *Morse* v. *Slue*,[5] which was decided as long ago as 1671. There the defendant, who was master of a ship, was held liable for the loss of certain goods which had been delivered to him by the plaintiff

[1] This phrase has been defined *ante*, p. 638.

[2] Piracy is also a "peril of the sea": *Republic of Bolivia* v. *Indemnity, &c., Assurance Co.*, [1909] 1 K. B. 785.

[3] This phrase is defined *ante*, p. 639.

[4] See *ante*, p. 637.

[5] 2 Lev. 69; 1 Vent. 190.

for carriage, even though such loss was not due to any negligence. It is not expressly stated in any of the reports of the case that it was a general ship. But this is immaterial, as there is no difference in this respect between the liability of the shipowner under a charter-party and his liability when the goods have been carried on a general ship. "And certainly," as Blackburn, J., says in *Liver Alkali Co.* v. *Johnson*,[1] "it is difficult to see any reason why the liability of a shipowner who engages to carry the whole lading of his ship for one person should be less than the liability of one who carries the lading in different parcels for different people." In this case the defendant, who was a barge-owner, let out barges under the care of his own servants to carry cargo to and from places in the Mersey. The places between which he plied were not fixed by him, but by each particular customer who chose to employ him. The plaintiffs hired a barge to carry some salt-cake from Widnes to Liverpool. The barge got on a shoal in consequence of a fog, and the cake was injured. It was held by the Court of Appeal that the defendant had incurred the liability of a common carrier, and must compensate the plaintiffs, though there was no negligence on his part.

The shipper, on the other hand, must lade the ship within the time stipulated in the charter-party or the bill of lading; or if none be stipulated, within a reasonable time. He must lade it with the cargo specified, which must not include anything explosive or contraband.[2] He usually has to pay in addition to the freight, primage (a small customary present to the master), average, several petty charges for beaconage, &c., and sometimes also demurrage. We will conclude with a brief explanation of these and other mercantile terms connected with carriage by sea.

Freight is the payment made for the conveyance of goods to their destination. No freight becomes due unless the transit of the goods is completed. If the ship be disabled from com-

[1] (1874), L. R. 9 Ex. at p. 341.

[2] Contraband of war ordinarily applies to goods, not to passengers: *Yangtsze Insurance Association* v. *Indemnity Mutual Marine Assurance Co.*, [1908] 2 K. B. 504.

pleting her voyage, the master may trans-ship the goods and convey them to their destination in a new ship, charging the freight originally agreed. The shipowner has a lien upon the cargo until the freight is paid, but this he may agree to waive. If goods brought from abroad reach England safely and their owner does not make entry for them and land them within the time appointed, or if none be appointed within seventy-two hours after the ship is reported, the shipowner may land them himself and place them in a warehouse. He will preserve his lien for the freight if he gives the warehouseman notice of it; and his ship is free for another voyage. If not claimed within ninety days, the goods may, after public notice, be sold and freight and warehouse rent deducted from the price.

Demurrage is the compensation payable by the shipper to the shipowner for detention of the ship through delay in loading or unloading. The charter-party usually allows the charterer a certain number of days in which to load or unload his cargo; these are called "lay days."[1] After the lay days are ended "demurrage days" begin, during which extra payment must be made for the use of the ship, usually at an agreed sum per day. The merchant must pay demurrage for any delay beyond the agreed period, even though it is not attributable to any fault of his (for example, if the crowded state of the docks prevents him from getting alongside the quay). Where time is allowed for unloading, it begins to run as soon as the vessel arrives at the usual place of discharge, not at the nominal entrance of the port.

Salvage is the compensation paid by the shipowner or merchant to other persons by whose assistance the ship or its cargo may be saved from impending peril (whether from the sea or enemies), or recovered after actual loss.[2] Actual passengers in the ship where there has been a common danger cannot claim salvage.

When the whole ship or the whole cargo is in jeopardy,

[1] These are also variously described in charter-parties as "days," "running days," "working days," "weather-working days."

[2] See 6 Edw. VII. c. 41, s. 65 (2).

whatever damage or loss is voluntarily incurred by the owner of any particular part for the preservation of the rest, is called a general loss,[1] and the several persons interested in the ship, freight and cargo must severally contribute their respective proportions to indemnify the owner of the particular part against the loss or damage which has been incurred for the good of all. Such a contribution is called "general average,"[2] and will be adjusted as soon as the ship arrives at its destination. In case of dispute, the matter is referred to a body of "average adjusters," whose decision is final. The master or other person in charge of the whole adventure decides whether a loss is to be incurred; only an act done by the master or person in charge of the ship, or with his sanction or authority, can create a right to general average. Stranding the ship to save her and the cargo, jettison, *i.e.*, throwing overboard part of the ship's cargo in order to lighten her in a storm, or cutting away the mast to secure the common good, are examples of such acts.

In a "particular average" loss[3] there is no voluntary sacrifice for the common good. A particular thing is lost, and the loss has to be borne where it falls. Thus, if an anchor is lost the shipowner must bear the loss; or if in a heavy sea the waves sweep overboard and damage part of the cargo, the owner of that part must bear the loss.

Bottomry is an agreement entered into by the owner of a ship or his agent, whereby, in consideration of a sum of money advanced for the use of the ship, the borrower undertakes to return the same with interest if the ship terminates her voyage successfully, and binds or hypothecates the keel or bottom of the ship for the performance of his contract. A similar contract, hypothecating the cargo of the ship, is called *Respondentia*, but it is of rare occurrence.

Since the introduction of the telegraph, bottomry bonds have become rarer. A shipowner, moreover, usually mortgages his ship instead of

[1] 6 Edw. VII. c. 41, s. 66 (1), (2).
[2] Though this term is often used to denote the loss which gives rise to it.
[3] S. 64 (1).

giving a bottomry bond. And the master of a ship has now by statute a maritime lien for disbursements.[1]

The master ought, if he can, before giving a bottomry bond, to communicate with the owners of the ship or cargo in order that they may have the chance to provide the necessary money in some other way. "The master is only the agent to bind the cargo-owner in the hour of necessity, and his authority must be measured by this principle."[2]

Where several bonds are given, charging the same subject-matter, the latest must be satisfied first.[3]

The letters C.F.I., when they occur in a contract for the sale of goods, stand for cost, freight and insurance. Their presence means that the contract price is to include the price of the goods and the cost of their carriage and insurance while in transit to the buyer. The letters F.O.B. ("free on board") mean that the contract price of the goods is to include the cost of delivering them on board ship. The property in goods specified in an f.o.b. contract passes to the purchaser as soon as they are shipped, although the seller may, in certain circumstances, have the right of stoppage *in transitu*. It is doubtful whether under a c.f.i. contract the property in the goods passes to the consignee on shipment; it probably does not pass to him until the bill of lading has been indorsed and handed to him. It seems to be clear, however, that during the voyage they are at the risk of the consignee.

When goods are consigned from any foreign port to England, the contract of sale is usually made c.f.i. The bill of lading is dispatched by post to the agent of the consignor at the port of arrival, who tenders it to the consignee and receives in exchange the full price mentioned in it. But if, as frequently happens, the bill of lading is tendered before the ship has arrived, it is often arranged that the consignee shall pay the agent of the consignor cost and insurance only when the bill of lading is tendered to him, and shall pay the freight to the shipowner as soon as the ship arrives.

[1] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 167.
[2] *Per* Bowen, L. J., in *The Pontida* (1884), 9 P. D. at p. 180.
[3] *The Eliza* (1833), 3 Hag. Adm. 87.

## Chapter XV.

### CONTRACTS OF ASSURANCE.

A CONTRACT of assurance or insurance is one under which a person or company agrees, in consideration of receiving a payment or a series of payments called premiums, to pay a larger sum if a particular event happens. The person or company thus agreeing is usually called the insurer; the person who may receive the larger sum is called the assured. The agreement is called a policy of assurance.

The chance that the particular event may or may not happen is called the risk; and it is against this risk that the assured is protected by the policy. As soon as a valid contract of assurance is legally concluded, the risk is said to attach; and after this has happened the premiums paid by the assured can in no case be returned to him. Nor will any such premiums be returned, if the policy was voidable *ab initio* by reason of fraud[1] or other illegal act[2] on the part of the assured. But if no contract was ever in fact made between the parties owing to some innocent mistake, the policy may be set aside and the premiums paid may be recovered.[3]

Any contract by which a man was protected against any contingent risk was regarded at common law simply as a wager or bet. Such contracts were nevertheless enforceable, unless the Court considered them to be against public policy. Many such contracts, which were in fact mere wagers, were entered into under the name of insurances. In 1774, however, the Gambling Act forbade the making of any insurance "on the life or lives of any person or persons, or on any event or events whatsoever, wherein the person or persons for whose

[1] *Prince of Wales Insurance Co.* v. *Palmer* (1858), 25 Beav. 605.
[2] *Harse* v. *Pearl Life Assurance Co.*, [1904] 1 K. B. 558.
[3] *Fowler* v. *Scottish Equitable Co.* (1859), 28 L. J. Ch. 225.

use, benefit, or on whose account such policy or policies shall be made shall have no interest; or by way of gaming or wagering."[1] Further, the policy must contain the names of the persons interested therein for whose use or benefit the policy is made.[2] If either of these two provisions is not satisfied, the policy is void.

In all kinds of insurance, then, to support the transaction the assured must have an "insurable interest" in the subject-matter of the insurance, and this interest must exist at the time when the contract is made, though it may have ceased before any money is payable under the policy. "I know no better definition of an interest in an event," said Lord Blackburn, "than . . . that, if the event happens, the party will gain an advantage; if it is frustrated, he will suffer a loss."[3]

Contracts of assurance are of many different kinds, and different rules apply to each. Those in most frequent use are:—

(i.) Contracts of life insurance, which include all policies of assurance upon human life, or the granting of annuities upon human life.

(ii.) Contracts of fire insurance, which protect the insurer against loss by or incidental to fire.

(iii.) Contracts of marine insurance, by means of which any person who is interested in a ship or its cargo is insured against any loss incident to marine adventure.

(iv.) Contracts of assurance against accidents, which entitle the insurer to any payment upon the death of a person from accident or violence, or otherwise than from a natural cause, or as compensation for personal injury.

(v.) Contracts of insurance by employers against their liability to pay compensation or damages to workmen in their employment.

These contracts are generally made under seal; but at

[1] 14 Geo. III. c. 48, s. 1.
[2] *Ib.*, s. 2; and see *Evans* v. *Bignold* (1869), L. R. 4 Q. B. 622.
[3] *Wilson* v. *Jones* (1867), L. R. 2 Ex. at p. 150, quoted with approval by Kennedy, L. J., in *Griffiths* v. *Fleming*, [1909] 1 K. B. at p. 820.

common law a seal was not necessary except when they were made with a corporation.

## LIFE INSURANCE.

A policy of life insurance is a contract by which the insurer for valuable consideration undertakes to pay to the person for whose benefit the insurance is made a certain sum of money on the death of the person insured, or an annuity on his attaining a certain age. The consideration may be either the payment of a gross sum or of certain annual premiums.[1] Such a policy is not a contract of indemnity. The insurer is bound to pay the agreed sum or annuity on the happening of the event named, not merely, as in the case of damage by fire or shipwreck, the pecuniary loss actually sustained. Hence a man may insure his life in as many companies as he pleases, and on his death his personal representatives can recover from each company the full amount for which he was insured with it.

The fact that the deceased's death was caused by the wrongful act, neglect or default of another person, and that the personal representatives of the deceased have recovered damages in respect thereof under the Fatal Accidents Act, 1846,[2] is no ground for the insurance company refusing to hand over the whole sum for which the policy was effected. And, in assessing the damages in an action under the Fatal Accidents Act, the jury must not take into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance.[3]

As we have seen above, the person who makes the contract must at the time have an "insurable interest" in the life which he insures; and, as a rule, this interest must be a pecuniary one. No greater sum can be recovered from the insurers than the value of the interest which the insured had

[1] When a policy has been in force for some time, the insurance company out of its profits often gives the assured a benefit or *bonus*. This either increases the amount payable under the policy when the life lapses, or is applicable in reduction of the future premiums. Sometimes the assured is entitled to a periodical bonus according to the prosperity of the company; this is called a participatory policy.

[2] 9 & 10 Vict. c. 93.

[3] 8 Edw. VII. c. 7.

in the life or lives insured at the moment of making the policy.[1] He can, however, recover the amount of his interest at that moment, although it has diminished or ceased before the time of payment arrives.

For example, a creditor may insure the life of his debtor to the extent of his debt,[2] and recover on the policy after the debt has been paid.[3] A surety may also insure the life of the principal debtor.[4]

Every one has an insurable interest in his own life.[5] "An insurance by a man on his own life is not within the mischief of the Act. A man does not gamble on his own life to gain a Pyrrhic victory by his own death."[6] And as there is no limit to what he may possibly earn or save, he may insure his life to any amount.

A wife always has an insurable interest in the life of her husband, for he is bound to maintain her.[7] It was, however, until recently, doubted whether a husband had such an interest in the life of his wife. But in *Griffiths* v. *Fleming*,[8] the Court of Appeal held that a husband will be presumed to have such an interest, and to the extent of the amount to which he insures her, though this presumption may be rebutted. "This interest appears to be the personal interest founded on affection and mutual assistance, and not a pecuniary interest."[9] It is, therefore, not necessary in order to establish the validity of the policy for the husband to give affirmative evidence that such an insurable interest exists.

A father has no insurable interest in the life of his child, unless he has in some way a pecuniary interest therein.[10] But a child has an insurable interest in the life of his father, for his father is bound to maintain him. A servant who has been engaged for a fixed number of years at a definite salary has an insurable interest in the life of his master to the extent of so much of that period as is unexpired at the time of effecting the policy.[11]

A person, who "undertakes for reward the nursing and maintenance of one or more infants under the age of seven years apart from their parents or having no parents," can have no insurable interest in the life of the child; to make, or attempt to make, such an insurance is a statutory offence.[12]

There is, however, on exception to the rule, that the person effecting the insurance must have an insurable interest in the life of the assured. A

[1] 14 Geo. III. c. 48, s. 3.
[2] *Ib.*, and *Hebdon* v. *West* (1863), 3 B. & S. 579.
[3] *Dalby* v. *India and London Assurance Co.* (1855), 15 C. B. 365.
[4] *Lea* v. *Hinton* (1854), 5 De G. M. & G. 823.
[5] *Wainwright* v. *Bland* (1836), 1 Moo. & Rob. 481.
[6] *Per* Kennedy, L. J., in *Griffiths* v. *Fleming*, [1909] 1 K. B. at p. 821.
[7] *Evans* v. *Bignold* (1869), L. R. 4 Q. B. 622.
[8] [1909] 1 K. B. 805; and see s. 11 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).
[9] *Per* Kennedy, L. J., *ib.*, at p. 823.
[10] *Halford* v. *Kymer* (1830), 10 B. & C. 724.
[11] *Hebdon* v. *West* (1863), 3 B. & S. 579.
[12] Children Act, 1908 (8 Edw. VII. c. 67), ss. 1 (i.), 7.

person may effect a valid policy of insurance with a collecting society or industrial assurance company for the payment of the funeral expenses of his parent, grandparent, grandchild, brother or sister, although he has not, at the time of effecting the policy, an insurable interest in their lives, provided he *bonâ fide* expects to incur expenses in connection with the death or funeral of the assured.[1]

The statute also requires that the name of the person for whose benefit the assurance is effected shall be expressly stated in the policy; and this rule is strictly enforced.[2] The law will not uphold any policy of insurance which in fact contravenes the rule, although on its face it appears to comply with it. A valid policy of insurance can, of course, be assigned,[3] and the assignee need not have an insurable interest.[4] But where A. insures his life at the instance and for the benefit of B. who is to pay the premiums, and in pursuance of an arrangement between them, under which B. is immediately to secure the sole benefit of the policy by assignment or otherwise, here the contract is from its inception made for the benefit of B., and B.'s name must be inserted in the policy; otherwise the contract is void *ab initio*, for it is a fraudulent evasion of the statute.[5] The mere circumstance, however, that B. pays A.'s premiums for him is not, of itself, sufficient to vitiate the policy.[6]

Fraud on the part of either party will render the contract voidable. If the policy was obtained by the fraud of any agent of the insurance company, the assured may recover the amount of any premiums he has paid, either by action of deceit,[7] or as money obtained for the defendant by the fraud of their agent.[8] But it is not, as a rule, necessary for the company to prove actual fraud. Any one who applies for a

[1] Assurance Companies Act, 1909 (9 Edw. VII. c. 49), s. 36.

[2] 14 Geo. III. c. 48, s. 2.

[3] This was so before the Judicature Act, 1873, was passed (see 30 & 31 Vict. c. 144); but notice of the assignment had to be given to the insurance company, as is still the case (s. 3); see *post*, p. 919.

[4] *Ashley* v. *Ashley* (1832), 3 Sim. 149.

[5] *Shilling* v. *Accidental Death Insurance Co.* (1857), 27 L. J. Ex. 16.

[6] *Wainwright* v. *Bland* (1836), 1 Moo. & Rob. 481.

[7] See the judgment of Lord Alverstone, C. J., in *Kettlewell* v. *Refuge Assurance Co.*, [1908] 1 K. B. at p. 550; this case was affirmed, [1909] A. C. 243.

[8] See the judgment of Buckley, L. J., [1908] 1 K. B. at pp. 552, 553; and *Barwick* v. *English Joint Stock Bank* (1867), L. R. 2 Ex. 259.

policy is usually required to answer the questions on a printed proposal form and sign a declaration at its foot that the answers shall form the basis of the contract and are true. Further, the policy usually contains a proviso that it was granted on the express condition that the answers given on the proposal form are true. All material facts must be disclosed at the time of the proposal. The company's questions usually cover a wide ground as to general health and previous illness. Nevertheless, the non-disclosure of material facts may vitiate the policy, although no specific inquiry was made as to them; for the applicant may often be aware of facts of which the company has no suspicion, and knowledge of which is essential to enable them properly to estimate the risk. The contract is, as we have seen,[1] one *uberrimæ fidei*; and any misstatement or suppression of any material fact, however innocently made, may vitiate the policy.

Thus, if the proposer makes no mention of a serious illness, this would make the contract voidable.[2] So would the non-disclosure of the fact that the proposer, though insured in certain offices, had been refused by others.[3] Reference to the usual medical attendant of the proposer is most important to an insurance company, for it can thus learn the medical history of the proposer.

Non-disclosure of the real medical attendant[4]—even though an unqualified doctor[5]—will vitiate the policy. Where a proposer concealed the fact that she had consulted a certain doctor for nervous depression, the jury found that this was a material fact for the insurance company to know; but as she had acted without fraud, and on the particular facts of the case the truth of her answer was not made part of the basis of the contract, it was held that there had not been sufficient non-disclosure of material facts to make the policy voidable.[6]

Many insurance policies are effected through agents; the knowledge of an agent is the knowledge of his principals; he must communicate to them what he knows.[7] He has no power to alter conditions in a policy,[8] and any statement made by him, whether orally or in writing, which is inconsistent with the terms of the policy, is not admissible in evidence against the

[1] *Ante*, p. 716.
[2] *British Equitable Co.* v. *Musgrave* (1887), 3 Times L. R. 630.
[3] *London Assurance Co.* v. *Mansel* (1879), 11 Ch. D. 363.
[4] *Huckman* v. *Fernie* (1838), 3 M. & W. 505.
[5] *Everett* v. *Desborough* (1829), 5 Bing. 503.
[6] *Joel* v. *Law Union and Crown Insurance Co.*, [1908] 2 K. B. 863.
[7] *Bawden* v. *London, Edinburgh, and Glasgow Assurance Co.*, [1892] 2 Q. B. 534.
[8] *Acey* v. *Fernie* (1840), 7 M. & W. 151.

company.[1] If an agent acts outside the scope of his authority, he cannot bind his principals unless they ratify and adopt his act.[2] Hence, if the applicant for a policy employs or permits a third person, even an agent of the company, to write the answers to the company's questions for him, he will be bound by any misstatement, even though innocently made by such third person ; and if such misstatement be material the policy will be void. Thus, where the local agent of an insurance company filled up the proposal form, and in so doing inserted untrue statements without the knowledge or authority of the intending insurer, who afterwards signed the proposal form without reading it, it was held that it was the duty of the applicant to read the answers to the questions in the proposal form before signing it, and that he must be taken to have read and adopted them ; and, secondly, that in filling in the false answers the agent was acting, not as the agent of the insurance company, but as the agent of the applicant, and that therefore the policy was void.[3]

As soon as the insurer receives the proposal form and assents to its terms, he is deemed to have promised to grant the proposer a policy of insurance. But no risk will, it seems, attach until he receives the first premium or consents to give credit for it. Indeed, it is usual for the insurer expressly to stipulate that there is to be no insurance till the first premium is paid. If in the interval circumstances change so as to materially alter the risk, the insurer can refuse to grant a policy.[4] Within a month of his accepting or giving credit for a premium the insurer must, under a penalty of £20, execute and duly stamp a formal policy.[5]

The policy usually contains a number of conditions as to regular payment of premiums, etc. Frequently it is stipulated that the insured person shall not increase the risk to his life by such acts as travelling in uncivilised countries, or that nothing shall be recoverable if he dies by suicide or at the hands of justice. As a man (or persons claiming through him) may not profit by his felonious act, death by felonious suicide or in a duel will not be covered by the policy, even

[1] *Horncastle* v. *Equitable Life Assurance Co. of U.S.A.* (1906), 22 Times L. R. 735.
[2] *Wing* v. *Harvey* (1854), 23 L. J. Ch. 511.
[3] *Biggar* v. *Rock Life Assurance Co.*, [1902] 1 K. B. 516 ; *Pearl Life Assurance Co.* v. *Johnson*, [1909] 2 K. B. 288. The same point has been similarly decided in Scotland : *Life and Health Assurance Association* v. *Yule* (1904), 6 F. 437.
[4] *Canning* v. *Farquhar* (1886), 16 Q. B. D. 727.
[5] Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 98—100. The amount of the stamp varies with the sum for which insurance is effected.

though there be no express conditions to that effect.[1] Where a husband insured himself in his wife's favour and his wife was afterwards convicted of his murder, it was held that the sum insured was payable to the husband's executors, but that the wife could take no benefit by her criminal act.[2] Suicide committed by a person of unsound mind does not make the policy void, unless there be an express condition to that effect.[3]

Money may be borrowed on the security of a policy of life insurance. In such a case the policy is either formally assigned by deed, or it may be deposited with the mortgagee with a memorandum in writing charging any money which may become payable under the policy with the repayment of the sum lent. A mere deposit of the policy does not amount to an assignment, even though the person with whom it is deposited subsequently pays the premiums,[4] but it confers on him a lien; hence temporary loans are often secured by simply depositing the policy.

No assignment, however, confers on the assignee or those claiming through him any right to sue the company until a written notice of such assignment has been given to the insurance company.[5] Such notice should be given as soon as possible after the assignment, for in the event of a second assignment, the priorities will depend upon the date of this notice; and, further, any *bonâ fide* payment made by the company previous to such notice will be valid in favour of the company. The assignee takes the rights which the assignor possessed, subject to any equities to which the policy was liable. If the assured person be dead already, and assignor and assignee are alike ignorant of the fact, the contract to assign is void.[6]

[1] *Amicable Society* v. *Bolland* (1830), 2 Dow & Cl. 1; *Cornish* v. *Accident Insurance Co.* (1889), 23 Q. B. D. 453; but see *Wigan* v. *English and Scottish Law Life Assurance Association*, [1909] 1 Ch. 291.
[2] *Cleaver* v. *Mutual Reserve Fund Association*, [1892] 1 Q. B. 147.
[3] *Horn* v. *Anglo-Australian Life Assurance Co.* (1861), 30 L. J. Ch. 511.
[4] *Howes* v. *Prudential Assurance Co.* (1883), 49 L. T. 133.
[5] 30 & 31 Vict. c. 144, s. 3.
[6] *Strickland* v. *Turner* (1852), 7 Exch. 208.

### FIRE INSURANCE.

By a policy of insurance against fire the insurer, in consideration of a payment of a certain annual premium, undertakes to make good to the assured any loss or damage caused by fire during the year to the property specified in the policy. The assured cannot recover more than the amount of his actual loss; for the contract is one of indemnity. It is true that a certain round sum is always named in the policy, and the assured cannot receive more than that sum, though he usually recovers less. The amount which he can recover depends entirely upon the loss which he has in fact sustained. If he is insured with two separate companies, he cannot recover twice over;[1] the two companies must share the loss between them in proportion to the sums named in their respective policies.

As in life insurance, a person who wishes to effect a policy against fire in the first place fills up by himself or his agent (who is often also an agent of the company) a proposal form, which usually states the names of the parties, the day on which the insurance is to commence, the term for which it is to be in force, the property to be insured and the place where the same is situate. He signs at the foot of this form a declaration that the statements contained in it are true. As soon as the insurer accepts the terms of the proposal the contract is complete,[2] and a duly written policy of insurance is forthwith prepared. This policy must, under a penalty of £20,[3] be executed and stamped with a penny stamp within one month after the insurer receives or takes credit for the premium or other consideration.

Anyone who proposes to insure his property against fire must make a full disclosure of all material facts. A fact is not necessarily immaterial because he did not consider it material.[4] A policy is usually, though not invariably, in force for one year only; it generally allows a certain number of days at the end of that year during which the policy can be renewed. Loss occurring during those days will be

[1] See *post*, p. 922.
[2] *Thompson* v. *Adams* (1889), 23 Q. B. D. 361.
[3] 54 & 55 Vict. c. 39, ss. 99, 100, unless a composition has been effected under s. 16 in accordance with 7 Edw. VII. c. 13, s. 8 (2).
[4] *Lindenau* v. *Desborough* (1828), 8 B. & C. 586.

covered if the assured pays his premium before the days expire.[1] But to pay a premium after those days without giving notice to the insurers of a loss which had already occurred to the knowledge of the owner would be fraud.[2]

The assured must have an insurable interest in the property insured at the time when the policy is effected, and also at the time when it is destroyed or injured by fire. It is only the value of his interest at the latter date which he can recover from the insurer. The owner of the property, whether legal or equitable, has, of course, an insurable interest, and so has anyone who holds the property in trust for the owner and is responsible to him for its safety. Both these classes of persons are entitled to recover the full amount of the loss.[3] A person who has a vested interest in the property insured in remainder or reversion has such an interest, but a person who has merely an expectancy or right incapable of being enforced at law has not.[4] Mortgagors and mortgagees, lessees for life or for a term of years, executors and administrators have such an interest, but can recover only to the value of their limited interest. If the premises are burnt to the ground, the owner can only recover the value of his old premises; he is not entitled to the cost of erecting new ones.[5] Where there has been a total loss of goods fully insured, any salvage that may remain will belong to the insurers.[6] But if the goods were not fully insured, the owner has what is left of them after his claim has been paid by the insurers.

If the assured parts with his interest in the property during the period of insurance, he cannot recover anything. A policy of fire assurance cannot be assigned without the consent of both parties, which is usually evidenced by an indorsement on the policy. Moreover, the removal of the goods from the place mentioned in the policy without the consent of the

[1] *Salvin* v. *James* (1805), 6 East, 571.
[2] *Bufe* v. *Turner* (1815), 6 Taunt. 338.
[3] *Waters* v. *The Monarch, &c., Insurance Co.* (1856), 5 E. & B. 870; see also *North British, &c., Insurance Co.* v. *Moffatt* (1871), L. R. 7 C. P. 25.
[4] *Lucena* v. *Craufurd* (1802), 3 Bos. & Pul. 75; (1806), 2 Bos. & Pul. N. R. 269.
[5] *Yates* v. *Dunster* (1855), 11 Exch. 15.
[6] *Da Costa* v. *Firth* (1766), 4 Burr. 1966.

insurer will render the policy voidable,[1] and generally if the assured breaks any of the conditions of the policy, this will give the insurers a right to avoid the contract. But this right may be waived by the subsequent conduct of the assurance company, as, for example, if it accepts a premium after knowledge of the breach.[2] So, if after the policy is effected the assured alters the premises in such a way as to increase the risk of fire, this will avoid the contract; whether the alteration would have this effect or not is a question of fact in each case.

The assured, as we have seen, can never recover more than his loss; hence the insurers, as soon as they have paid him the full amount of such loss, are entitled to the benefit of all his legal remedies against third parties. They have a right to be "subrogated" or put in the place of the assured;[3] and they need no longer sue in his name.[4] If the assured has rights against third parties and either voluntarily or for payment forbears to exercise them, the insurers can recover from him the amount which they could have claimed had those rights been enforced.[5]

In *Darrell* v. *Tibbitts*[6] the tenants of a house were compensated by the Brighton Corporation for damage done to the house by a steam-roller which broke a gas-pipe and caused an explosion. The tenants repaired the premises according to their covenant with the landlord. But the landlord also recovered on a fire insurance policy. The insurers, who had paid in ignorance of the tenants' repairing covenant, were entitled to recover their money from the landlord, who would otherwise have been paid twice over.

### MARINE INSURANCE.

A contract of marine insurance is one "whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is

[1] *Pearson* v. *Commercial Union Assurance Co.* (1876), 1 App. Cas. 498.
[2] *Wing* v. *Harvey* (1854), 5 De G. M. & G. 265.
[3] *Aldridge* v. *G. W. Ry. Co.* (1841), 3 Man. & G. 515.
[4] *King* v. *Victoria Insurance Co.*, [1896] A. C. 250.
[5] *Castellain* v. *Preston* (1883), 11 Q. B. D. 380; *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q. B. 226.
[6] (1880), 5 Q. B. D. 560.

to say, the losses incident to marine adventure." The law upon the subject has been codified by the Marine Insurance Act, 1906.[1] The policy must specify (1) the name of the assured or of some person who effects the insurance on his behalf; (2) the subject-matter insured and the risk insured against; (3) the voyage, or period of time, or both, as the case may be, covered by the insurance; (4) the sum or sums insured; (5) the name or names of the insurers, who are usually called "underwriters," as it is the practice for them to subscribe at the foot of the policy their names and the amounts for which they agree to be respectively liable.[2]

The assured must have an insurable interest in either the ship, the cargo, or the marine adventure. Such interest exists where a person is so placed with respect to the thing insured as to have either benefit from its continued existence or prejudice from its destruction or damage.[3] The owner of the ship or of any goods on board her has an insurable interest to the extent of the value of the ship or goods respectively. The mortgagee of a ship has an insurable interest to the extent of his debt, and a mortgagor has such an interest to the value of the ship,[4] the lender of money on bottomry or *respondentia*[5] to the extent of the amount payable to him under the bond,[6] and a person to whom freight is payable to the extent of such freight.[7] "The master or any member of the crew has an insurable interest in respect of his wages."[8] The assured need not be interested at the time when the insurance is effected; it is sufficient if he is interested at the time of the loss.[9] But if at the time of effecting the policy he had no insurable interest and no expectation of acquiring any such interest, the policy is void as a gaming or wagering contract.[10]

[1] 6 Edw. VII. c. 41, s. 1.
[2] *Ib.*, s. 23.
[3] Cf. *ib.*, s. 5.
[4] *Ib.*, s. 14; *Alston* v. *Campbell* (1779), 4 Brown, Parl. Cas. 476.
[5] See *ante*, p. 910.
[6] 6 Edw. VII. c. 41, s. 10.
[7] *Ib.*, s. 12.
[8] *Ib.*, s. 11.
[9] *Ib.*, s. 6.
[10] *Ib.*, s. 4.

It lies upon the assured to prove that he has an insurable interest, and he cannot relieve himself of this burden by inserting in the policy certain words, such as "interest or no interest," "full interest admitted,"[1] "the policy itself sufficient proof of interest."[2] Policies so worded are called "P.P.I. policies;" they are not legally binding. If any person in the employment of the owner of a ship, not being a part owner of the ship, effects such a policy, he will be guilty of an offence under the Marine Insurance (Gambling Policies) Act, 1909,[3] and punishable on summary conviction with imprisonment for six months or by fine not exceeding £100, and will be liable in either case to forfeit to the Crown any money he may receive under the contract. The same punishment is imposed on anyone who effects a contract of marine insurance without having any *bonâ fide* interest either in the safe arrival of the ship or in the safety or preservation of the subject-matter insured, or a *bonâ fide* expectation of acquiring such an interest.

"Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue, the insurer may avoid the contract."[4] Representations as to matters of fact are "true" if substantially correct, and as to matters of expectation or belief if made in good faith.[5] Full disclosure of material facts must be made by both parties. "If the utmost good faith be not observed by either party, the contract may be avoided by the other party."[6] "Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."[7] In the absence of inquiry, the assured need not disclose any circumstance which diminishes the risk, or which is known or presumed to be known to the insurer. "The insurer is

[1] *Berridge* v. *Man On Insurance Co.* (1887), 18 Q. B. D. 346.
[2] 6 Edw. VII. c. 41, s. 4 (2).
[3] 9 Edw. VII. c. 11.
[4] 6 Edw. VII. c. 41, s. 20 (1).
[5] *Ib.*, s. 20 (3), (4), (5).
[6] *Ib.*, s. 17; see *Carter* v. *Boehm* (1766), 3 Burr. at p. 1909.
[7] *Ib.*, s. 18 (2).

presumed to know matters of common notoriety or knowledge and matters which an insurer in the ordinary course of his business, as such, ought to know."[1] Nor need the assured disclose any circumstance as to which information is waived by the insurer, or anything which it is superfluous to disclose by reason of any express or implied warranty. What is material and what is not is a question of fact.[2]

In marine insurance a short document called a "slip" takes the place of the ordinary proposal form. This slip contains brief particulars of the proposed insurance. It is prepared by the broker for the insurers and is submitted to the underwriters or their brokers, who, if they agree to take the risk, initial the slip, naming at the same time the sum for which they undertake to be liable. As soon as the slip is initialled, the contract is concluded between the parties;[3] but owing to the strict provisions of the Stamp Act, 1891,[4] it cannot be enforced until it is subsequently embodied in a policy properly stamped and executed. Only such a policy is admissible as evidence of the contract in any Court of law.[5] By initialling the slip the underwriters impliedly promise to grant a policy, but no action can be maintained against them should they refuse to do so.[6] If, however, a proper policy be subsequently effected and duly stamped, reference may be made to the slip, although it is unstamped, for the purpose of showing the date at which the liability of the insurers commenced; and the insurer will be liable for any loss or damage occurring to the ship between the date on which the slip was initialled and the date of the policy.[7]

Where consideration for the payment of the premium wholly fails and there has been no fraud or illegality on the part of the assured or his agents, the assured can recover the premium; and if the consideration is apportionable, and wholly fails in respect of an apportionable part, a proportionate part of the premium may be recovered.[8]

If the policy does not specify the value of the subject-matter insured, it is called an "open" or "unvalued policy." It leaves the insurable value to be subsequently ascertained, subject to the limit of the total sum insured.[9] But the policy

[1] 6 Edw. VII. c. 41, s. 18 (3 b.); see also *The Bedouin*, [1894] P. 1; *Charlesworth* v. *Faber* (1900), 5 Com. Cas. 408.
[2] *Ib.*, s. 18 (4).
[3] *Ib.*, s. 21; see *Morrison* v. *Universal Marine Insurance Co.* (1873), L. R. 8 Ex. at p. 199.
[4] 54 & 55 Vict. c. 39, ss. 92—97.
[5] 6 Edw. VII. c. 41, s. 22.
[6] *Fisher* v. *Liverpool Marine Insurance Co.* (1874), L. R. 9 Q. B. 418.
[7] *Mead* v. *Davison* (1835), 3 A. & E. 303.
[8] 6 Edw. VII. c. 41, s. 84 (1), (2).
[9] *Ib.*, s. 23.

may be a "valued" one, specifying the agreed value of the subject-matter insured; if so, in the absence of fraud, the value so fixed is, "as between the insurer and assured," conclusive as to the insurable value of the subject intended to be insured, whether the loss be total or partial.[1]

If it be shown that the assured had only a partial interest in the subject-matter insured, the valuation will be taken to apply only to his proportion of interest. Where freight was "valued at £2,000" and one-half had been prepaid, the assured recovered a total loss on the other half.[2] And where freight was "valued at £6,500," but at the moment of loss only 55 bales were on board the ship, the assured recovered such proportion of £6,500 as the 55 bales bore to the ship's whole cargo.[3]

It will be observed, then, that whenever the contract of insurance is an open one, the damages claimed under it are unliquidated, and the contract is almost invariably one of strict indemnity; no more than the insurable interest or the loss suffered can be recovered.[4] But when the policy is a valued one, it is possible for the assured to recover more than he has actually lost by reason of the depreciation of the ship subsequent to the making of the contract.

Before loss, the benefit of a policy of marine insurance can only be assigned along with the property insured, or in pursuance of an agreement to assign it made at the time such property was sold to the assignee.[5] After loss, however, the policy may be separately assigned. In both cases the assignee can sue in his own name and recover the full value of the loss or damage, although he had no insurable interest in the property at the time when the policy was effected. The insurer can raise any defence which would have been available to him if the action had been brought by the assignor, provided it arises under the policy assigned.[6] This is another instance in which a policy of marine insurance is not a mere contract of indemnity; for if a policy be assigned after loss, the holder may recover though he has no insurable interest in the thing insured.

A "floating policy" is one which describes the insurance in general terms, leaving the name of the ship or ships or other details to be subsequently defined.[7] This is used where the assured has ordered goods, but does not yet know the quantity or quality or the ship by which they will arrive.

[1] 6 Edw. VII. c. 41, s. 27 (3).
[2] *Allison* v. *Bristol M. I. Co.* (1876), 1 App. Cas. 209; and see *Feise* v. *Aguilar* (1811), 3 Taunt. 506.
[3] *Forbes* v. *Aspinall* (1811), 13 East, 323.
[4] *Baker* v. *Adam* (1910), 102 L. T. 248.
[5] 6 Edw. VII. c. 41, s. 51.
[6] *Ib.*, s. 50 (2); *Baker* v. *Adam*, *supra*.
[7] *Ib.*, s. 29 (1).

A "Lloyd's policy" is one drawn in the form which is set out in the First Schedule to the Act. It is a form which has long been in use as a voyage policy; there are statutory rules for the interpretation of its terms.

A policy may be made subject to certain so-called "warranties," which are really conditions.[1] A warranty is defined by the Act as "a promissory warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts." Such a "warranty may be express or implied; it must be exactly complied with, whether it be material to the risk or not. If it be broken, then, subject to any express provision in the policy, the insurer is discharged from liability as from the date of the breach."[2] It is no defence for the assured to say that the breach has been remedied and the warranty complied with before loss, but the insurer may waive the breach.[3]

"There is no implied warranty as to the nationality of a ship, or that her nationality shall not be changed during the risk."[4] There is an implied warranty of the seaworthiness of the ship in voyage policies, but not in time policies;[5] there is no implied warranty that goods are seaworthy.[6] There is an implied warranty that the adventure insured is a legal one,[7] that the adventure shall be commenced in a reasonable time,[8] and prosecuted with reasonable despatch,[9] and that there be no change of voyage or deviation without lawful excuse.[10]

Unless otherwise agreed, the insurer is liable for "any loss proximately caused by a peril insured against." He is not

[1] For the distinction between a warranty and a condition in a contract for the sale of goods, see *ante*, pp. 786—789.
[2] 6 Edw. VII. c. 41, s. 33.
[3] *Ib.*, s. 34.
[4] *Ib.*, s. 37.
[5] *Ib.*, s. 39.
[6] *Ib.*, s. 40.
[7] *Ib.*, s. 41.
[8] *Ib.*, s. 42 (1).
[9] *Ib.*, s. 48.
[10] *Ib.*, ss. 45, 46; and see s. 49 as to "lawful excuse."

liable for loss attributable to the wilful misconduct of the assured; but, unless otherwise agreed, "he is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or the crew."[1] Unless otherwise agreed, the insurer of ship or goods is "not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;" nor is he liable for "ordinary wear and tear, ordinary leakage and breakage," inherent vice of the thing insured, loss proximately caused by rats or vermin, or injury to machinery not proximately caused by maritime perils.[2]

A loss may be either total or partial. A total loss is either an actual or a constructive total loss: the words "total loss" in a policy ordinarily include both actual and constructive.[3] An actual total loss occurs if the thing insured is destroyed or so damaged as to lose its species,[4] or if the assured is irretrievably deprived thereof.[5] A constructive total loss occurs where the thing insured is reasonably abandoned on account of its actual loss appearing unavoidable, or because the cost of preserving it from actual total loss would exceed its value.[6] In determining whether a ship seriously damaged by perils insured against can be treated as a constructive total loss, the test is whether a prudent uninsured owner would repair her having regard to all the circumstances.[7]

When there is a constructive total loss, the assured can either (1) treat the loss as partial, or (2) treat it as total and abandon the thing insured to the insurer. In the latter case he must give notice of abandonment.[8] The insurer then takes over the interest of the assured in what is left of the

[1] 6 Edw. VII. c. 41, s. 55. See *Trinder* v. *Thames and Mersey Marine Insurance Co.*, [1898] 2 Q. B. 114.
[2] *Ib.*, s. 55 (c).
[3] *Ib.*, s. 56.
[4] See *Roux* v. *Salvador* (1836), 7 L. J. Ex. 328; *Cossman* v. *West* (1887), 13 App. Cas. at pp. 174, 181.
[5] *Ib.*, s. 57 (1). As to total loss by capture, see *Andersen* v. *Marten*, [1908] A. C. 334.
[6] *Ib.*, s. 60 (1), (2).
[7] *Macbeth & Co. Ltd.* v. *Maritime Insurance Co.*, [1908] A. C. 144, overruling *Angel* v. *Merchants' Marine Insurance Co.*, [1903] 1 K. B. 811.
[8] *Ib.*, ss. 61, 62.

thing insured, and becomes entitled to any freight earned by the ship after abandonment.[1] Where the insurer pays for a total loss, he thereupon becomes entitled to take over the assured's interest in whatever is left of the thing so paid for, and he is thereby "subrogated" to all the rights and remedies of the assured from the date of the loss.[2] A partial loss is any loss other than a total loss. General average loss, particular average loss and salvage we have mentioned elsewhere.[3]

## Assurance Against Accident.

A policy of assurance against accident usually provides that the assured shall receive certain weekly payments if he suffers disablement from any physical injury caused by "violent, accidental, external and visible means," and that his representatives shall receive a certain sum if such injury results in his death within a specified time. "Disablement" occurs when the assured is prevented, wholly or partially, from attending to his ordinary business; it may be either permanent or temporary, total or partial; and these terms are, as a rule, carefully defined in the policy. The amount payable in case of death and the weekly compensation for disablement are fixed by the policy, without any regard to the income or earnings of the assured; in other words, the contract is not one of indemnity. But the weekly payments continue only so long as the assured is disabled, and the policy often provides that in no case shall such compensation be payable for more than twenty-six weeks for any one accident. The period covered by the assurance is generally one year, though it may be limited to any period, or confined to a particular journey. At the end of the year the assurance company is in no way bound to renew the policy; it may continue it or not, at its pleasure.[4] The policy must bear a penny stamp,[5]

[1] 6 Edw. VII. c. 41, s. 63 (1), (2); and see *Robert Besnard Co.* v. *Murton* (1909), 101 L. T. 285.

[2] *Ib.*, s. 79.

[3] *Ib.*, ss. 64—66, and see *ante*, pp. 909, 910.

[4] *Simpson* v. *Accidental Death Insurance Co.* (1857), 2 C. B. N. S. 257; *Stokell* v. *Heywood*, [1897] 1 Ch. 459.

[5] 54 & 55 Vict. c. 39, s. 1, unless a composition has been effected under s. 116.

except in the case of a policy of insurance authorised by the Friendly Societies Act, 1896, or by the rules of a society or a branch society registered under that Act.[1]

It is necessary in the first place to determine, so far as is possible, the precise meaning of the word "accident." It is unfortunately used in two very different senses—one much wider than the other. Strictly, an occurrence can only be said to be accidental when it is due neither to design nor to negligence. For, if an act be intentional, it is clearly no accident; if it be the result of culpable negligence, then by due care it could have been avoided, and the negligent person cannot be allowed to excuse himself by declaring it an accident. In this narrower sense of the word, an accident must be "nobody's fault."

Thus an injury caused by lightning, tempest, or any extraordinary rainfall—any *vis major* or "act of God"—is accidental and therefore not actionable.[2] The sudden and unexplained bolting of a horse would also be an accident in this sense. The loss of a deed, the disappearance of a will, may be accidental. Where rats on board a ship gnawed through a lead pipe, and the sea water consequently escaped and damaged the cargo, the judges were much divided; but the House of Lords eventually decided that this was a "danger or accident of the seas," the jury having expressly found that there was no negligence on the part of the shipowners.[3]

So, in Courts of equity, the word "accident" has always been defined as "such an unforeseen event, misfortune, loss, act, or omission, as is not the result of any negligence or misconduct in the party" applying for relief.[4] In criminal law, too, "an effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it."[5] If death is caused by pure accident, no crime is committed. But if the act which caused the death

[1] 59 & 60 Vict. c. 25, s. 33.
[2] *Nichols* v. *Marsland* (1876), 2 Ex. D. 1; *Nugent* v. *Smith* (1876), 1 C. P. D. 423.
[3] *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518.
[4] Story, 78.
[5] Stephen, Digest of Criminal Law, 6th ed., art. 231.

is one which the accused knew, or ought to have known, to be dangerous to human life or likely to cause grievous bodily injury, then its commission is culpable negligence and is not a pure accident.[1]

But the word "accident" is constantly used to describe a collision on a railway, or any similar disaster, whether it is caused by anyone's negligence or not. The word is used in this more extended meaning in the title of Lord Campbell's Fatal Accidents Act, 1846,[2] and throughout the Notice of Accidents Acts, 1894 and 1906.[3] In policies of assurance against accidents, the word usually covers the results of the assured's own negligence as well as that of other people, but not of his own deliberate act.

In any action brought on a policy of assurance against accidents the plaintiff must establish that he has sustained injury in consequence of an "accident" within the meaning of the policy. The risk insured against is generally defined with exactness in the conditions of the policy.

1. There must as a rule be some external violence operating directly upon the person of the assured. If the assured's own deliberate act produces as its ordinary result some injury to himself, this is not covered by the policy.[4] Thus suicide is not an accident.[5] But suicide is not to be presumed.[6]

2. There is generally a proviso which excludes death or disablement resulting from any natural disease or internal weakness, or any medical operation rendered necessary by any such disease or weakness. Under this proviso it has been held that the insurer was not liable for death caused by sunstroke.[7] But where the assured was heavily thrown from his horse while hunting, and the ground being very wet he was wetted to the skin, and his vitality was so much lowered by

[1] See *ante*, pp. 285—288.
[2] 9 & 10 Vict. c. 93.
[3] 57 & 58 Vict. c. 28; 6 Edw. VII. c. 53, *post*, p. 1036, n. As to the meaning of the word accident under the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1906, see *post*, pp. 936, 937.
[4] *Clidero* v. *Scottish Accident Insurance Co.* (1892), 19 Rettie (Sc.), 355; but see *Hamlyn* v. *Crown Accidental Insurance Co.*, [1893] 1 Q. B. 750.
[5] *Ellinger & Co.* v. *Mutual Life Insurance Co. of New York*, [1904] 1 K. B. 832.
[6] *Trew* v. *Railway Passengers' Assurance Co.* (1861), 6 H. & N. 839.
[7] *Sinclair* v. *Maritime Passengers' Assurance Co.* (1861), 3 E. & E. 478.

the shock of the fall and the wetting that pneumonia subsequently set in and proved fatal, it was held by the Court of Appeal that his death was directly caused by an accident within the meaning of the policy.[1]

3. The policy does undoubtedly protect the assured from the consequences both of his own and of other people's negligence. Thus compensation has been recovered in cases where the accident was caused by the assured jumping into or out of a railway carriage or omnibus while in motion. It is usual now, however, for the insurance company to guard itself by a proviso that the policy shall not cover any injury caused by the assured's acting in contravention of the by-laws of any public company. It is usual also to exclude any accident which happens to the assured while he is under the influence of intoxicating liquor.[2] But, in all cases not covered by such exceptions, the assured can recover, though his own misconduct or negligence conduced to the accident. Some companies also insert in their policies a clause excluding liability for injuries sustained by the assured "while wilfully (or wantonly) exposing himself to unnecessary danger," or "to obvious risk of injury." This clause has the effect of excluding all accidents which arise from the assured exposing himself to any risk of injury which was obvious to him at the time; or would have been obvious to him if he had paid reasonable attention to what he was doing.[3]

4. The death or disablement must be the direct result of the accident. As a rule this is a simple issue of fact. But legal questions of some difficulty arise, when two or more causes contribute to produce death or injury to the assured. If a man suffering from a serious illness meets with an accident, and subsequently dies, it may be difficult to determine whether his death was caused by the illness or by the accident. It is immaterial whether the illness precedes or succeeds the

[1] *In re Etherington and Lancs. and Yorks. Accident Insurance Co.*, [1909] 1 K. B. 591; *Yates* v. *South Kirby, &c. Collieries*, [1910] 2 K. B. 538.

[2] *Mair* v. *Railway Passengers' Assurance Co.* (1877), 37 L. T. 356.

[3] *Cornish* v. *Accident Insurance Co.* (1889), 23 Q. B. D. 453; and see *Shilling* v. *Accidental Death Insurance Co.* (1857), 26 L. J. Ex. 266; (1858), 1 F. & F. 116; and *Mair* v. *Railway Passengers' Assurance Co.*, *supra*.

accident in point of date. The question in every case is, What really caused the death? If the accident is the true cause of death or disablement, the interposed disease is merely a link in the chain of circumstances, and not a separate and independent cause.

Thus, if an accident brings on, as its natural or very usual result, some form of disease such as hernia or erysipelas, and that hernia or erysipelas causes death, then here clearly the accident directly causes the death, though it preceded the disease in point of time; the whole train of circumstances constitutes a single cause.[1] And this is so, although the policy expressly provides that the insurance shall not extend to hernia or erysipelas, or other form of disease. Unless the terms of the policy make it clear that the intention of the parties was otherwise, such an exception will not protect the insurer when these diseases are the direct result of an accident within the meaning of the policy.[2] So where a signalman saw that an accident to a train was imminent, and the consequent excitement and alarm produced a nervous shock which incapacitated him from work, it was held that this was an accident within the meaning of the policy.[3]

But if a man is afflicted with a dangerous disease, and an accident occurs to him during his illness, and after the accident he dies of the disease, then clearly the accident is not the cause of death.[4] Thus, where the assured both before and after the accident suffered from Bright's disease, and died from that disease, but the progress of the disease was accelerated by an accidental fall from his dogcart, the Court held that it had not been proved that the assured died from the accident, and gave judgment for the defendants.[5] But where the assured, whilst crossing and fording a stream, was seized with an epileptic fit and fell into the stream, and was there drowned whilst suffering from the fit, the Court of Appeal held that the death was occasioned by "accidental, external, and visible means," and that the company was liable, although the policy contained a proviso that the insurance should not extend "to an injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease;" for the assured sustained no personal injury which could occasion death except the drowning, which was accidental.[6]

As in all other cases of insurance, the assured must make a full disclosure of all material facts. If there be any false

[1] *Isitt* v. *Railway Passengers Assurance Co.* (1889), 22 Q. B. D. 504.
[2] *Fitton* v. *Accidental Death Insurance Co.* (1864), 17 C. B. N. S. 122; *Smith* v. *Accident Insurance Co.* (1870), L. R. 5 Ex. 302.
[3] *Pugh* v. *L. B. & S. C. Ry. Co.*, [1896] 2 Q. B. 248.
[4] *Cawley* v. *National Employers' Association* (1885), 1 C. & E. 597.
[5] *M'Kechnie's Trustees* v. *Scottish Accident Assurance Co.* (1889), 17 Rettie (Sc.), 6.
[6] *Winspear* v. *Accident Insurance Co.* (1880), 6 Q. B. D. 42; and see *Reynolds* v. *Accidental Insurance Co.* (1870), 22 L. T. 820; *Lawrence* v. *Accidental Insurance Co.* (1881), 7 Q. B. D. 216; *Wicks* v. *Dowell & Co. Ltd.*, [1905] 2 K. B. 225.

statement or misrepresentation, or any suppression of the truth, whether fraudulent or not, in any proposal or application for the policy, or in any claim made under it, the contract is void.[1] The same result will follow in the case of death, if the insurance was really effected by someone who had no insurable interest in the life of the assured; and this whether the policy was made out in the name of the assured or not.[2] Again, it is generally made a condition precedent to any liability on the part of the insurance company, that notice of any accident should be promptly given to them at their head office; and if so, the absence of such notice is a defence to any action on the policy,[3] even though it was impossible to give the required notice.[4] But, to produce this result, the giving of such notice must be expressly made a condition precedent to liability.[5] The policy often provides in addition that the company may, if it thinks fit, send its own medical man to attend or visit the assured, or have a post-mortem examination, or require other proof satisfactory to its directors of the cause of death, of the nature of the accident, of the extent of disablement, &c. And compliance with these provisions may also be made a condition precedent to liability. But it must be remembered that "proof satisfactory to the directors" in such a provision means "proof which ought to be satisfactory to the directors;"[6] and that the assured or his representative is not bound to forward any such proof after the company has once definitely repudiated all liability.[7] Lastly, the policy usually contains a clause entitling the company, if it thinks fit, to have any dispute referred to arbitration; and if the clause be drawn in such a way that no cause of action accrues till the amount payable has been determined by arbitration, then such clause

[1] See *London Assurance Co.* v. *Mansel* (1879), 11 Ch. D. 363; *Thomson* v. *Weems and others* (1884), 9 App. Cas. 671.

[2] *Shilling* v. *Accidental Death Insurance Co.* (1857), 26 L. J. Ex. 266; *Harse* v. *Pearl Life Assurance Co.*, [1903] 2 K. B. 92.

[3] *In re Williams and Lancs. and Yorks. Accident Insurance Co.* (1903), 51 W. R. 222.

[4] *Cassel* v. *Lancs. and Yorks. Accident Insurance Co.* (1885), 1 Times L. R. 495; *Cawley* v. *National Employers' Association* (1885), 1 C. & E. 597.

[5] *Stoneham* v. *Ocean Accident Assurance Co.* (1887), 19 Q. B. D. 237.

[6] *Braunstein* v. *Accidental Death Insurance Co.* (1861), 31 L. J. Q. B. 17.

[7] *Shiells* v. *Scottish Assurance Corporation* (1889), 16 Rettie (Sc.), 1014.

is a condition precedent, and will afford an answer to any action.[1] In any arbitration under such a clause, the arbitrators or umpire have now full power to state, in the form of a special case, any question of law arising in the course of the reference.[2]

## Assurance Against Employers' Liability.

There is another form of accident insurance which has become common since the passing of the Employers' Liability Act, 1880, and the subsequent Workmen's Compensation Acts. Under this form of insurance the insurer undertakes to indemnify the assured against any liability which he may incur for damages or costs, in case anyone in his employ should be accidentally injured and should claim compensation from his employer. The premium payable is usually calculated in the form of a percentage on the total amount of wages paid by the employer, but on various scales, according to the risks of the particular trade which he carries on. These policies also must bear a penny stamp.[3] The provisions of the Life Insurance Acts, 1870 to 1872, are extended to companies undertaking employers' liability business.[4] So, too, policies are now issued to the owners of public vehicles, indemnifying them against all claims by persons who may be injured by any accident when riding in, or alighting from, such vehicle. The owner of any private carriage may also be indemnified against the carelessness of his coachman, but not against negligence of his own.

All these are contracts of indemnity, and are regulated by the same rules as fire and marine insurance; the principle of contribution is applicable; and the liability of the insurer depends on the antecedent liability of the assured. Unless the person injured has a valid claim for compensation against the assured, either at common law or under the statute, the

[1] *Caledonian Insurance Co.* v. *Gilmour*, [1893] A. C. 85.

[2] 52 & 53 Vict. c. 49, ss. 7, 19; *Istitt* v. *Railway Passengers Assurance Co.* (1889), 22 Q. B. D. 504.

[3] 62 & 63 Vict. c. 9, s. 11, overruling the decision in *Lancashire Insurance Co.* v. *Commissioners of Inland Revenue*, [1899] 1 Q. B. 353.

[4] By the Assurance Companies Act, 1909 (9 Edw. VII., c. 49).

assured has no insurable interest and therefore no claim under the policy. The word "accident" in such a policy means any injury in respect of which compensation is properly claimed from the plaintiffs.

We have already discussed generally the cases in which an employer is liable under the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1906, respectively for personal injuries caused to his workmen by any accident arising out of and in the course of their employment.[1] There has been much discussion as to the precise meaning of the word "accident" under these Acts. All the cases, up to April, 1905, will be found collected in the arguments and judgments in the case of *Brinton's, Ltd.* v. *Turvey*.[2] In that case a workman who had been employed in sorting wool died of anthrax, caused by a bacillus passing from the wool into the corner of his eye; and the Court held that it was a case of "injury by accident," within the meaning of the Act. "When some affection of our physical frame is in any way induced by an accident, we must be on our guard that we are not misled by medical phrases to alter the proper application of the phrase 'accident causing injury,' because the injury inflicted by accident sets up a condition of things which medical men describe as disease."[3] "The accidental character of the injury is not, I think, removed or displaced by the fact that, like many other accidental injuries, it set up a well-known disease, which was immediately the cause of death."[4] The reasons, however, given by Lord Robertson for his dissenting judgment deserve careful consideration.

Since this decision the Court of Appeal has held that a workman, who in the course of his employment was stationed close to an open hatchway, who was seized with an epileptic fit, and consequently fell into the hold and was injured, was entitled to recover compensation under the Act.[5] In *South Staffordshire Tramways Co.* v. *Sickness and Accident Assurance Association*,[6] the Court of Appeal decided that if a tramcar was overturned, and forty persons were injured, there were forty accidents, not one. Again, where the engine-driver of a train was injured by a stone intentionally thrown at the engine by a boy standing on a bridge over the railway, it was held by the Court of Appeal that the injury was caused by an accident within the meaning of section 1 of the Workmen's Compensation Act, 1897.[7] In *Steel* v. *Cammell, Laird & Co., Ltd.*,[8] a workman, whose employment necessitated the handling of white and red lead, gradually accumulated lead in his system, with the ultimate result that he suffered

[1] See *ante*, pp. 859—866.
[2] [1905] A. C. 230. But see *Broderick* v. *L. C. C.*, [1908] 2 K. B. 807.
[3] *Per* Lord Halsbury, L. C., *ib.*, at p. 233.
[4] *Per* Lord Macnaghten, *ib.*, at p. 234.
[5] *Wicks* v. *Dowell & Co., Ltd.*, [1905] 2 K. B. 225.
[6] [1891] 1 Q. B. 402.
[7] *Challis* v. *L. & S. W. Ry. Co.*, [1905] 2 K. B. 154.
[8] [1905] 2 K. B. 232.

from lead-poisoning which produced partial paralysis and incapacity for work. Mathew, L. J., was of opinion that this was not an accident within the meaning of the Act. The other two members of the Court expressed no opinion on this point, but Collins, M. R., said: "It appears that an accident must be a mishap from which the element of haphazard is to be eliminated, and the word at the same time is to be treated as being used in its popular and ordinary sense." [1]

Where a workman in the employment of a firm of shipbuilders, while engaged in tightening a nut with a spanner, suddenly fell down dead, and the post-mortem examination showed that the man was suffering from a very large aneurism of the aorta, and that he died from rupture of the aorta which was probably caused by his pressing heavily on the spanner, it was held by a majority of the House of Lords that this was an "accident" within the meaning of the Workmen's Compensation Act, 1906.[2]

It is usual to insert in policies of assurance against employers' liability, clauses protecting the company against any change in the trade of the employer or his mode of conducting it, and also a proviso obliging him to defend any action brought against him by his workman, if the company requires him so to do, and forbidding his compromising the action or paying any compensation to the workman without the consent of the directors. The policy also frequently requires the employer to give immediate notice to the company at their head office of any accident causing injury to a workman in his employ, and stipulates that time shall be of the essence of such condition. Notice by telephone to the person who introduced the employer to the company has been held not to be notice to the company within the meaning of this condition.[3]

There are many other contracts of assurance in common use. Householders often insure themselves against losses by burglary and theft. The conditions of such policies are similar to those of fire insurance. The rights of the parties, of course, depend on the express terms of their agreement.

Thus the policy often excludes any claim for loss by theft or robbery committed by members of the assured's household, business staff, or other inmates

[1] [1905] 2 K. B. at p. 236; and now see *Yates* v. *South Kirby, &c., Collieries*, [1910] 2 K. B. 538.

[2] *Clover, Clayton & Co., Ltd.* v. *Hughes*, [1910] A. C. 242.

[3] *In re Williams and Lancs., &c., Insurance Co.* (1903), 51 W. R. 222.

of the insured premises.[1] Where the policy-holder was insured against the risk of "theft following upon actual forcible and violent entry upon the premises," and a thief in the early morning entered the premises by merely turning the handle of an unlocked and unbolted door, it was held that the loss was not due to "actual forcible and violent entry," and therefore it was not covered by the policy.[2] Where a proposal for burglary insurance was accepted and a policy executed under the seal of the insurance company and a loss then occurred, it was held that there was a completed contract of insurance, although the policy remained in the hands of the company and nothing had yet been paid by way of premium; for the policy recited that a premium had been paid, and the insurers were therefore held to have waived prepayment.[3]

There is another kind of insurance known as guarantee insurance. A common example of this is where a man seeks to enter into the employ of another, and an assurance company guarantees his honesty and fidelity. A policy is drawn up, whereby the company undertakes to recoup the employer any loss which he may suffer through the servant's dishonesty to the extent of the sum secured by the policy. The annual premium required varies with the nature of the employment, the duties to be performed and the amount of security required. These policies differ from other insurances in that innocent concealment by the assured of material facts does not avoid the contract, but if the concealment be fraudulent the contract may be set aside.[4] Such contracts usually provide that the employer shall give notice to the company of any dishonest act of his servant within a specified time, but even without such provision the employer is bound to communicate to the insurer any knowledge or suspicion of dishonesty.

By an assurance policy of a very similar kind companies often guarantee the solvency of a trader or become surety for the payment of the principal or interest due on any mortgage, debenture or other debt. Companies which carry on assurance business must perform certain statutory obligations in respect of deposit, audit, accounts and other matters.[5]

[1] *Saqui* v. *Stearns and others*, [1910] W. N. 147.
[2] *In re George and Goldsmiths, &c., Insurance Association, Ltd.*, [1899] 1 Q. B. 595.
[3] *Roberts* v. *Security Co., Ltd.*, [1897] 1 Q. B. 111.
[4] *North British Insurance Co.* v. *Lloyd* (1855), 10 Exch. 523; *Lee* v. *Jones* (1862), 17 C. B. N. S. 482.
[5] See the Assurance Companies Act, 1909 (9 Edw. VII. c. 49).

## Chapter XVI.

### IMPLIED CONTRACTS AND QUASI-CONTRACTS.

Every true contract is founded upon the consent of the parties. As a rule, such consent is given expressly, though in many cases it is implied. If the terms of the contract are written down or declared at the time of making it, it is an express contract. But we can often infer from the circumstances of the case and the conduct of the parties what their intentions were, although they have not stated them in so many words; and the agreement thus arrived at is an implied contract, which the law will enforce whenever the intentions of the parties are clear.

A promise will be implied in a great variety of very different circumstances. If A. takes his seat in a tramcar and the car starts, he must pay the conductor at least the fare to the next stopping-place; for by his conduct he has tacitly agreed so to do. Where a person buys an article and its price is not definitely fixed at the time of the purchase, he will be deemed to have intended to pay its market value or what it is fairly worth. So if A. employs B. to do some business or to execute some work for him without any express agreement as to B.'s remuneration, it will be assumed, in the absence of special circumstances, that A. intended to pay him so much as his labour deserved.

The same rule applies whenever one man avails himself of the benefit of services done for him by another, although without his express authority or request. If a carpenter makes a bookcase for A. under the mistaken impression that A. had ordered him so to do, and the bookcase is erected in A.'s library and used by him, A,must pay him a fair price for it. If a wine merchant sends wine to A.'s house, which A. drinks, he must pay for it, though he never ordered it.[1]

Again, if C. employs D. as his agent in a certain transaction, the law will imply an undertaking by C. to indemnify D. against all losses, damages, and expenses properly incurred by him in the transaction. And generally, whenever C. requests D. to do any lawful act which may involve him in personal liability, C. must indemnify D. against all the natural consequences of D. complying with his request.[2]

[1] Cf. *Hart* v. *Mills* (1846), 15 M. & W. 85.

[2] *Dugdale* v. *Lovering* (1875), L. R. 10 C. P. 196; *Palmer* v. *Wick Steam Shipping Co.*, [1894] A. C. 318, 324.

Whenever A. gives B. an unconditional acknowledgment that he owes B. a definite sum of money, such as an I O U, the acknowledgment imports a promise to pay.[1] So if A. owes B. various small sums of money and B. owes A. other sums of money, and the two meet and go into their cross-accounts, setting off what A. owes B. against what B. owes A. and then strike a balance, this is called "settling an account." If the balance thus arrived at be in favour of A., the law will imply a promise by B. to pay him such balance; for otherwise the whole performance would be meaningless. Neither the acknowledgment nor the settled account need contain an express promise to pay, for this is implied from the conduct of the parties. In both cases, however, it will be open to B. to prove that there was a mistake in the figures,[2] or that the money was not yet due,[3] or that the consideration for the debt had failed,[4] or never existed,[5] or was illegal.[6]

If a man pays a debt due from a friend of his without any request so to do, he cannot claim the money from his friend; for the law does not allow one man to make himself the creditor of another without the latter's consent.[7] But if a man request his friend to pay his debt for him, the law will imply a promise to repay the amount; for that was no doubt the intention in the debtor's mind when he made the request.

If A. asks B. to become surety for him to C., and B. does so, with the result that both A. and B. are compellable to pay money to C.—A. being primarily liable and B. only as surety for A.—then, if B. is compelled to pay the money, he can recover it back from A., a promise so to pay it being implied from the request that he should become a surety.[8] So if two or more persons are jointly liable under the same contract, and one of them, under legal compulsion, pays the whole of the joint debt, he is entitled to contribution from the others.[9] If a sub-lessee is compelled to pay the head-rent under a threat of distress of his goods, he may recover the amount so paid from his immediate lessor, or he may deduct it from his rent.[10]

But a man cannot recover money which he has voluntarily paid for another, although that other might have been compelled to pay it.[11] Thus if two houses, separately sub-demised, are included in one lease, and one sub-lessee is compelled to pay the whole of the head-rent, he cannot recover

[1] *Irving* v. *Veitch* (1837), 3 M. & W. 90; *Buck* v. *Hurst* (1866), L. R. 1 C. P. 297.
[2] *Perry* v. *Attwood* (1856), 6 E. & B. 691.
[3] *Lemere* v. *Elliott* (1861), 6 H. & N. 656.
[4] *Jacobs* v. *Fisher* (1845), 1 C. B. 178.
[5] *Kennedy* v. *Brown* (1863), 13 C. B. N. S. 677.
[6] *Rose* v. *Savory* (1835), 2 Bing. N. C. 145.
[7] *Andrew* v. *Bridgman*, [1908] 1 K. B. 596.
[8] *Roberts* v. *Crowe* (1872), L. R. 7 C. P. 629.
[9] *Holmes* v. *Williamson* (1817), 6 M. & S. 158.
[10] *Exall* v. *Partridge* (1799), 8 T. R. 308.
[11] *England* v. *Marsden* (1866), L. R. 1 C. P. 529.

anything from the other.[1] And if one of two tenants in common repairs the common property, he cannot sue the other for contribution.[2]

In all the above instances a promise is implied as an inference of fact. But there are many cases in which it would be absurd to pretend that either party had any intention of entering into any contract or making any promise to pay or refund money. In such cases, therefore, no contract can be implied without having recourse to a wholly unnecessary legal fiction; and yet it may be clearly just and equitable that one party should pay or refund the money in question. The defendant has, in fact, made no contract, nor committed any tort; the circumstances are inconsistent with the idea that he ever intended to do what the Court now thinks he ought to do. The law, therefore, in order to give the plaintiff a remedy, assimilates to contracts cases in which there clearly is in fact no contractual relation whatever between the parties. These we may best describe as "quasi-contracts"—for that term in itself denotes that they are not contracts at all, but that it is convenient to treat them as if they were. The law, desiring to do what is right between the parties, gives a remedy by analogy to contract and in the form of an action on a contract, because otherwise no remedy would exist.

The best illustration, probably, of a quasi-contract is the time-honoured instance known to the Roman Law as *Indebiti Solutio*.[3] Suppose A., who owes B. £5, meets C., who strongly resembles B., and thrusts the money into his hand, saying, "Here is the money I owe you." If C. retains the money paid to him in such circumstances, he commits no tort; he has made no misrepresentation; he has said nothing to lead A. to suppose that he is B. Yet there clearly ought to be some remedy to compel C. to refund the money. In such a case the common law of England construes this to be money had and received for the use of the person who paid it by mistake, and allows him to bring an action *quasi ex contractu* to recover it, although there is no possible ground for implying that the recipient ever promised to repay it.

The principle underlying this class of cases is admirably explained by Lord Mansfield, in his judgment in *Moses* v. *Macferlan*:[4] "This kind of

[1] *Hunter* v. *Hunt* (1845), 1 C. B. 300; *Johnson* v. *Wild* (1890), 44 Ch. D. 146.
[2] *Leigh* v. *Dickeson* (1885), 15 Q. B. D. 60.
[3] Justinian Institutes, Book III., Title xxvii., 6.
[4] (1760), 2 Burr. at p. 1012.

equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund. It does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law—as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied), or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

This passage from the judgment of Lord Mansfield was cited with approval in *Bradford Corporation* v. *Ferrand*[1] by Farwell, J., who adds, "Baron Martin, in *Freeman* v. *Jeffries*,[2] explains actions *quasi ex contractu* thus: 'But for a long time implied contracts have been admitted into the law, where, a transaction having taken place between parties, a state of things has arisen in reference to it which was not contemplated by them, but is such that one party ought in justice and fair dealing to pay a sum of money to the other.'"

Again, Lindley, L. J., remarks in *In re Rhodes*, *Rhodes* v. *Rhodes*,[3] owing to the "unfortunate terminology of our law, . . . the expression 'implied contract' has been used to denote not only a genuine contract established by inference, but also an obligation which does not arise from any real contract, but which can be enforced as if it had a contractual origin. Obligations of this class are called by the civilians *obligationes quasi ex contractu*." In *Guardians of Birkenhead Union* v. *Brookes*,[4] Darling, J., quoted this passage with approval, and added, "Now I understand that to mean that they are obligations, and they are imposed by the law. They do not rest upon contract at all; they do not rest upon any supposed contract at all. They rest upon simple obvious justice."

These cases, which, for want of a better name, we group under the title quasi-contracts, are of great variety. They are not true contracts; many, indeed, are more closely akin to torts; others are based upon general principles of equity.

[1] [1902] 2 Ch. at p. 662; and see the remarks of Tindal, C. J., in *Tregoning* v. *Attenborough* (1830), 7 Bing. at p. 98.
[2] (1869), L. R. 4 Ex. at p. 199.
[3] (1890), 44 Ch. D. at p. 107.
[4] (1906), 95 L. T. at p. 362.

They are, however, obligations which our Courts of law and of equity will enforce. But we can only in this chapter deal in any detail with those instances which fall under the three following heads :—

(i.) Money received by the defendant to the use of the plaintiff.

(ii.) Penal actions.

(iii.) Foreign judgments.

### (i.) *Money Received to the Use of the Plaintiff.*

Under the old system of pleading, the plaintiff frequently inserted in his declaration a count for money payable by the defendant to the plaintiff for money received by the defendant for the use of the plaintiff.[1] This was one of the most comprehensive and elastic of the forms of action under which money could be claimed. It is still applicable wherever the defendant has received a definite sum of money which in justice and equity belongs to the plaintiff.

Whenever the plaintiff has paid money to the defendant for a consideration which has wholly failed, it may be recovered by him as money received to his use,[2] *e.g.*, if he has paid the defendant money for a worthless cheque,[3] or under a contract of sale which has been rescinded,[4] or which the defendant could not complete.[5] So if a principal has handed money to his agent to be employed in a particular manner and such expenditure subsequently becomes unnecessary, or if the authority of the agent be revoked before he has spent the money, the principal may recover it.[6] In such cases, however, the failure of consideration must be complete in order to entitle the plaintiff to recover the money he had paid over to the defendant.[7]

If the plaintiff has paid the defendant money under a mistake of fact, or by reason of an excusable forgetfulness of fact, he may recover it back from the defendant as money received to his use.[8]

[1] This was one of the common counts in "*Indebitatus Assumpsit*." A declaration was the name formerly given to what is now called a statement of claim.

[2] *Straton* v. *Rastall* (1788), 2 T. R. 366.

[3] *Woodland* v. *Fear* (1857), 26 L. J. Q. B. 202.

[4] *Blackburn* v. *Smith* (1848), 2 Exch. 783 ; *Ashworth* v. *Mounsey* (1853), 9 Exch. 175 ; *Simmons* v. *Heseltine* (1858), 28 L. J. C. P. 129.

[5] *Gosbell* v. *Archer* (1835), 2 A. & E. 500.

[6] *Taylor* v. *Lendey* (1807), 9 East, 49 ; *Fletcher* v. *Marshall* (1846), 15 M. & W. 755.

[7] *Nicholson* v. *Ricketts* (1860), 29 L. J. Q. B. 55.

[8] *Kelly* v. *Solari* (1841), 9 M. & W. 54 ; *Durrant* v. *Ecclesiastical Commissioners* (1880), 6 Q. B. D. 234.

If a man wrongfully usurps the office of another and receives the emoluments annexed to it, that other may recover the emoluments as money had and received to his use. Similarly, if a man receives the fees attached to an office which he holds under a void appointment, such fees may be recovered from him by the person who was validly appointed to that office.[1] If the plaintiff has paid under protest money to the defendant in discharge of a demand illegally made upon him, he may recover it back as money had and received to his use; for example, an overcharge demanded by a carrier for carrying goods,[2] or an excessive charge paid to the steward of a manor for admission to copyholds,[3] or money improperly demanded as a toll.[4]

Whenever money has been wrongfully obtained by the defendant through duress of the plaintiff's person or his goods or by any other tortious oppression, the plaintiff may waive the tort and claim the money as having been received to his use.[5] And the same rule applies where the plaintiff's goods have been wrongfully obtained and converted by the defendant into money.[6]

Money paid under process of law cannot be recovered so long as the process remains in force, even though the plaintiff is now in a position to prove that he paid in error what he was not legally bound to pay.[7] After a settlement under legal process it would be against public policy to allow the matter to be re-opened.[8] But where A. brought an action against B. for £125 and allowed him credit on the writ for £75, which A. mistakenly supposed B. had paid on account, and claimed only the balance, and B. paid the balance claimed and obtained from A. a receipt for the whole £125, it was held that A. could recover the £75 as B. knew that A. had made a mistake, and had taken an unfair advantage of it.[9]

### (ii.) *Penal Actions.*

There are many acts which our ancestors desired to prohibit, but which they did not wish to constitute felonies or misdemeanours, as all crimes in those days were very severely punished. They therefore prohibited them by passing a statute which rendered the offender liable to pay as a penalty

[1] *Howard* v. *Wood* (1678), 2 Lev. 245; *King* v. *Alston* (1848), 12 Q. B. 971.
[2] *Ashmole* v. *Wainwright* (1842), 2 Q. B. 837; *Parker* v. *G. W. Ry. Co.* (1844), 7 M. & G. 253; *Piddington* v. *S. E. Ry. Co.* (1858), 5 C. B. N. S. 111; *Baxendale* v. *G. W. Ry. Co.* (1858), 5 C. B. N. S. 309.
[3] *Traherne* v. *Gardner* (1856), 5 E. & B. 913.
[4] *Waterhouse* v. *Keen* (1825), 4 B. & C. 200.
[5] *Astley* v. *Reynolds* (1731), 2 Str. 915; *Shaw* v. *Woodcock* (1827), 7 B. & C. 73; *Skeate* v. *Beale* (1840), 11 A. & E. 983; *Oates* v. *Hudson* (1851), 6 Exch. 346; *Owen* v. *Cronk*, [1895] 1 Q. B. 265.
[6] *Lamine* v. *Dorrell* (1705), 2 Ld. Raym. 1216; *Oughton* v. *Seppings* (1830), 1 B. & Ad. 241; *Bavius, Junr. and Sims* v. *London and South Western Bank*, [1900] 1 Q. B. 270.
[7] *Marriott* v. *Hampton* (1797), 7 T. R. 269; 2 Smith L. C., 11th ed., 421.
[8] *Moore* v. *Vestry of Fulham*, [1895] 1 Q. B. 399.
[9] *Ward & Co.* v. *Wallis*, [1900] 1 Q. B. 675.

a sum of money to be recovered from him by a civil action. Such an action was called a penal action; the plaintiff was sometimes the person aggrieved by the act, sometimes the Attorney-General, but most frequently a "common informer." In order to encourage common informers to bring such actions they were frequently allowed to keep half the penalty for themselves on paying the other half to the King.[1] The statute often expressly authorised the plaintiff to bring an action of debt for the penalty. There was, of course, no debt, but it was convenient to treat the matter as though a debt existed. The case is therefore clearly one of quasi-contract. And in modern times statutes have frequently imposed penalties on the commission of acts which they prohibit, and direct the manner in which such penalties are to be recovered. The Attorney-General must sue for the penalty, unless the particular statute expressly allows the person aggrieved or a common informer to sue. Penal statutes are always construed restrictively.[2]

Penal actions are not criminal proceedings; in form, at all events, they are civil actions; but in such actions the plaintiff has no right to administer interrogatories or to obtain discovery of documents.[3]

By 2 Wm. & M., Sess. 1, c. 5, any person who commits a pound breach or rescues any goods distrained for rent, whether he be the owner of the goods or not, is liable to pay treble damages, which can be recovered from him by the person aggrieved in a special action on the case.

By 11 Geo. II. c. 19, s. 3, any tenant or lessee, who fraudulently removes his goods in order to avoid a distress for rent by his landlord, and any person, who wilfully and knowingly aids or assists him in fraudulently removing or concealing them, is liable to pay double the value of the goods so removed or concealed, and this penalty can be recovered by the landlord by an action of debt in any of His Majesty's superior Courts of Record.

By the Parliamentary Oaths Act, 1866,[4] it is provided that "if any

[1] The action was then called a *qui tam* action, as the informer sued *tam pro domino rege, quam pro se ipso*.

[2] See the judgment of Fletcher Moulton, L. J., in *Moulis* v. *Owen*, [1907] 1 K. B at p. 764.

[3] *Martin* v. *Treacher* (1886), 16 Q. B. D. 507; *Mayor of Derby* v. *Derbyshire C. C.* [1897] A. C. 550.

[4] 29 & 30 Vict. c. 19, s. 5; see *Bradlaugh* v. *Clarke* (1883), 8 App. Cas. 354, in which case Mr. Bradlaugh had sat and voted without having taken the oath and had therefore clearly incurred the penalty, but it was held that a common informer could not bring an action to recover the penalty as the statute gave him no interest therein either by express words or necessary implication.

member of the House of Commons votes as such in the said House . . . without having made and subscribed the oath of allegiance appointed to be taken, he shall be subject to a penalty of £500 to be recovered by action in one of Her Majesty's superior Courts."

Again, by section 41 of the County Courts Act, 1888,[1] every registrar, treasurer, high bailiff or other officer of any county court, who shall be, by himself or his partner, or in any way directly or indirectly concerned as solicitor or agent for any party in any proceeding in the county court, shall for every such offence forfeit and pay the sum of £50 to any person who shall sue for the same by an action of debt.

By the Public Health Act, 1875,[2] any person, who, not being duly qualified to act as member of a local board, acted as such member, was liable to a penalty of £50, which could have been recovered in a Court of summary jurisdiction by any person by action of debt; but no one except the party aggrieved, or the local authority of the district in which the offence was committed, could sue for the penalty without the leave of the Attorney-General. The Local Government Act, 1894,[3] contains a similar provision to the effect that any person, who acts when disqualified as a member of a parish or district council or board of guardians, shall be liable to a fine not exceeding £20 recoverable before justices in the manner provided by the Summary Jurisdiction Acts.[4]

In any proceeding for an offence under the Rivers Pollution Act, 1876,[5] the county court having jurisdiction in the place where the offence is committed may by summary order require the offender to abstain from the commission of the offence, and if he disobey such order the judge may impose on him a penalty not exceeding £50 a day for every day during which he is in default payable to the person complaining, such penalty to be enforced in the same manner as any debt adjudged to be due by the Court.

Various statutes have defined the limit of time within which penal actions could be brought. By 3 & 4 Will. IV. c. 42, s. 3, the time (unless otherwise specified by a particular statute) is limited to a period of two years from the arising of the cause of action.[6]

### (iii.) *Foreign Judgments.*

The judgment of an English Court, as we have seen,[7] cannot properly be called a contract, for it is not founded upon any agreement between the parties. Such a judgment is an act of the Court, which imposes an obligation on an unwilling party. On such an obligation no action can, as a rule, be

[1] 51 & 52 Vict. c. 43.
[2] 38 & 39 Vict. c. 55, s. 253.
[3] 56 & 57 Vict. c. 73, s. 46.
[4] See 42 & 43 Vict. c. 49, s. 51.
[5] 39 & 40 Vict. c. 75, s. 10.
[6] See *Robinson* v. *Currey* (1881), 6 Q. B. D. 21.
[7] *Ante*, p. 661.

brought; none is necessary, for the judgment can itself be immediately enforced.

But a foreign judgment stands on a different footing.[1] It can only be enforced here by bringing a second action on it, as though it were a contract. It is not a contract, but it is convenient to treat it as such. It is not strictly, in this country, *res judicata*, and therefore does not create an absolute estoppel. Nevertheless it is practically conclusive between the parties on the merits.

A foreign judgment does not create a merger so as to extinguish the original cause of action.[2] Thus, to such an action on the original grounds it would not be a good plea to show a judgment against the defendant in a foreign Court on the same grounds, unless the plea also alleged satisfaction by payment of the sum recovered.[3] But it would be a good defence to show a judgment in a foreign Court against the plaintiff.[4]

A foreign judgment for a fixed amount establishes a debt of which the foreign judgment will be at least *primâ facie* evidence. Every presumption will be made in favour of such a judgment; it will be presumed that the foreign Court has jurisdiction over any matter which it entertained.[5] It is no defence that the foreign Court made a mistake either in its own law or in ours.[6] This is so, apparently whether such a mistake appear on the face of the record or not,[7] or whether the defendant was or was not guilty of *laches* in bringing the English law before them in evidence. For a foreign Court must be presumed to know its own law; and English law in a foreign country is a mere question of fact to be proved before the Court like any other fact,[8] and the Court which tries the question is the best judge of facts.[9]

[1] And for this purpose a Scotch, Irish or Colonial judgment is a foreign judgment. But Scotch and Irish judgments may be registered here and enforced under the Judgments Extension Act, 1868 (31 & 32 Vict. c. 54), without the necessity of commencing a fresh action in England.

[2] *Smith* v. *Nicholls* (1839), 5 Bing. N. C. 208; *Bank of Australasia* v. *Harding* (1850), 9 C. B. 661; *Bank of Australasia* v. *Nias* (1851), 16 Q. B. 717.

[3] *Barber* v. *Lamb* (1860), 29 L. J. C. P. 234.

[4] *Ricardo* v. *Garcias* (1845), 12 Cl. & F. 368.

[5] *Houlditch* v. *Marquis of Donegal* (1834), 8 Bli. N. S. 301; *Henderson* v. *Henderson* (1844), 6 Q. B. 288.

[6] *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.

[7] But see *Robertson* v. *Struth* (1844), 5 Q. B. 941.

[8] See *Castrique* v. *Imrie* (1870), L. R. 4 H. L. 414.

[9] *Bank of Australasia* v. *Harding*, *suprà*; *Bank of Australasia* v. *Nias*, *suprà*; *Godard* v. *Gray* (1870), L. R. 6 Q. B. 139.

But the judgment of a foreign Court may be impeached here,

(i.) if the foreign Court knowingly and perversely refused to act on the English law proved before it, in matters which it acknowledged should be governed by English law;[1] or

(ii.) if the judgment be not final and conclusive on the face of it;[2] or

(iii.) if the judgment be "contrary to the first principles of reason and justice."[3] It is not sufficient to show that the plaintiff could not have succeeded if he had brought his action here. It is doubtful whether a foreign judgment upon a contract which by English law is illegal or immoral will be enforced in England.[4] Or

(iv.) if the judgment be proved to have been obtained by fraud;[5] or

(v.) if the Court had not jurisdiction over either the subject-matter of the suit or the parties;[6] or

(vi.) if the defendant was not summoned, and had no notice of the proceedings[7]—unless he voluntarily appeared and submitted himself to the jurisdiction of the Court: by thus taking his chance of a judgment in his favour, he is bound by the Court's decision.[8]

Thus, in *Ferguson* v. *Mahon*,[9] to an action on a judgment obtained in the Court of Common Pleas in Ireland, the defendant pleaded that he had never been served with, or at any time had notice of, any process of the

[1] *Simpson* v. *Fogo* (1860), 29 L. J. Ch. 657; *Reimers* v. *Druce* (1857), 26 L. J. Ch. 196; *Munroe* v. *Pilkington* (1862), 31 L. J. Q. B. 81.

[2] *Frayes* v. *Worms* (1861), 10 C. B. N. S. 149; *Nouvion* v. *Freeman* (1890), 15 App. Cas. 1.

[3] *Per* Lord Ellenborough, C. J., in *Buchanan* v. *Rucker* (1807), 1 Camp. at p. 66; criticised by Blackburn, J., in *Schibsby* v. *Westenholz* (1870), L. R. 6 Q. B. at p. 160; and see notes in 2 Smith L. C., 11th ed., at pp. 789, 790.

[4] See *Santos* v. *Illidge* (1860), 8 C. B. N. S. 861, on the one hand, and such cases as *Kaufman* v. *Gerson*, [1904] 1 K. B. 591; *Moulis* v. *Owen*, [1907] 1 K. B. 746, on the other. But all these were cases in which the original action was brought in England, not actions on a foreign judgment.

[5] *Cammell* v. *Sewell* (1858), 27 L. J. Ex. 447; *Vadala* v. *Lawes* (1890), 25 Q. B. D. 310; *Codd* v. *Delap* (1905), 92 L. T. 510.

[6] *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.

[7] *Rousillon* v. *Rousillon* (1880), 14 Ch. D. 351; see also *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670; followed in *Bromley R. D. C.* v. *Croydon Corporation*, [1908] 1 K. B. 353.

[8] *De Cosse Brissac* v. *Rathbone* (1861), 30 L. J. Ex. 238. See *Feyerick* v. *Hubbard* (1902), 71 L. J. K. B. 509; and *Jeannot* v. *Fuerst* (1909), 25 Times L. R. 424.

[9] (1839), 11 A. & E. 179.

Court at the plaintiff's suit for the cause of action on which the judgment was obtained, and that he (the defendant) had never appeared to the action; and this plea was held good, because, said Lord Denman, C. J., "when it appears, as here, that the defendant has never had notice of the proceeding or been before the Court, it is impossible for us to allow the judgment to be made the foundation of an action in this country."

A foreign Court by English law [1] has jurisdiction over—

(i.) its own subjects and all persons domiciled in that country;

(ii.) those who are resident therein at the time of commencing the suit, whether domiciled there or not; for they owe local or temporary allegiance;

(iii.) those who were resident in the country at the time of the making of the contract or doing the act on which the proceedings are based; [2]

(iv.) any one who selects that tribunal to sue in as plaintiff;

(v.) any one who voluntarily appears to defend the action; [3] and also over

(vi.) any property within its jurisdiction, but not over the owner of it merely as such owner.[4]

Contracting parties may confer a more extensive jurisdiction on a foreign tribunal by stipulating that its judgment shall bind them for all future time.[4] They thus submit absolutely to the foreign jurisdiction.[5] But such stipulation must be express: it cannot be implied.

The sentence of a foreign Court of Admiralty of competent jurisdiction pronounced *in rem* is conclusive against all the world as to the existence of the ground on which the Court professes to decide, provided such ground appear clearly on the face of the sentence.[7] The sentence must positively aver the facts sought to be proved and specifically profess to be founded on them. But though admissible and conclusive evidence of the points it thus involves, the judgment cannot be pleaded as an estoppel.

[1] See the judgment of Blackburn, J., in *Schibsby* v. *Westenholz* (1870), L. R. 6 Q. B. at pp. 159, 160.

[2] *Douglas* v. *Forrest* (1828), 4 Bing. 686, 703.

[3] *Novelli* v. *Rossi* (1831), 2 B. & Ad. 757; and see *Carrick* v. *Hancock* (1895), 12 Times L. R. 59.

[4] See *British S. A. Co.* v. *Companhia de Moçambique*, [1893] A. C. 602.

[5] *Hamlyn* v. *Talisker Distillery Co.*, [1894] A. C. 202, 213.

[6] *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, [1894] A. C. 670, 685.

[7] See *Minna Craig S. S. Co.* v. *Chartered Mercantile Bank*, [1897] 1 Q. B. 55, 460.

Foreign judgments upon matters in their nature local, such as the title to land there situate, must be given the same effect here as abroad, but of course no greater effect ; our Courts will refuse to re-try the matter here. Similar effect must be given to any foreign judgment dealing with personal property situated in that foreign country. If it be disposed of in a manner binding according to the law of the country in which it is, that disposition is binding everywhere—unless, indeed, the law of that foreign country be barbarous or monstrous, or of so dangerous and unusual a character that it ought not to be recognised by other countries as giving validity to a contract of sale.[1]

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We now conclude the observations as to criminal offences and civil obligations, and proceed to discuss the methods by which the former can be punished and the latter enforced.

[1] See the remarks of Crompton, J., in *Cammell* v. *Sewell* (1860), 5 H. & N. at pp. 743, 744, and of Blackburn, J., in *Schibsby* v. *Westenholz* (1870), L. R. 6 Q. B. at p. 160 ; and see *Duchess of Kingston's Case* (1776), 2 Smith L. C., 11th ed., at pp. 789, 790.

# ADJECTIVE LAW.

## BOOK V.—PART I.

### Chapter I.

#### RELIEF.

The preceding chapters of this work have been mainly concerned with substantive rights and wrongs. In this Book we propose to deal with the procedure by which rights are enforced and wrongs redressed. This is often called Adjective Law. A State, as we have seen, is a political community which governs itself, and it governs itself by means of laws. A law is a rule of conduct which the State prescribes and enforces. It is prescribed by Substantive Law, and enforced by Adjective Law. In other words, Substantive Law deals with rights and duties, Adjective Law with remedies.

It is perhaps a misfortune that in nearly every modern State the law is laid down adjectively rather than substantively; that is to say, the remedy can be ascertained more readily and easily than the precise nature and extent of the right infringed. In an ideal *corpus juris* each right should first be defined, and clearly and accurately defined, and then the remedy should follow as a corollary.

Yet the Adjective Law has its value and importance. The wisest measure conferring rights or imposing duties will be inoperative, if no adequate remedy be provided in case those rights are violated or those duties neglected. A defect in the machinery by which an Act of Parliament is to be enforced will often render that Act a dead letter.

Often, too, what purports to be only a change in procedure

really effects a change in Substantive Law. A new remedy is created, or an old remedy is extended, to cover new cases, or a new ground of defence permitted to an inequitable claim; in each case the Substantive Law is altered. When the prætor first allowed an *exceptio doli*, when the clerks of the Chancery first issued writs *in consimili casu*, they were really altering and extending the existing Substantive Law of the realm.

Take, for instance, Mr. Fox's Libel Act, which was passed in 1792.[1] It purported to make only a technical change in procedure; it merely said that a certain question, whether a writing was or was not a libel, should be answered by the jury and not by the judge. And yet this change in procedure, which sounds merely technical, has had a widespread and most beneficial effect; for it established on a permanent basis in England the liberty of the Press.

Again, take Lord Campbell's Libel Act of 1843.[2] Up to that time it had been the rule in criminal cases that "the greater the truth, the greater the libel." There was some sense in this maxim; it meant that the truer the charge, the more likely it was to stir up angry feelings and to provoke a breach of the peace. But this result followed, that a man could be prosecuted, fined, and imprisoned for publishing what was literally true. In civil proceedings the maxim did not apply; the truth of the words was always a perfect answer to any claim for damages; no plaintiff could recover compensation for injury to a reputation to which he had no right. But in criminal proceedings prior to 1843, the defendant was never allowed to plead that his words were true. Yet there are many occasions on which it is right and necessary that the truth should be spoken, and fully and fearlessly spoken, even though someone's reputation may be injured thereby. There are other occasions on which to rake up some ancient scandal and give it publicity is a cruel and malicious act which can benefit nobody, even though the words be literally true. Hence Lord Campbell's Libel Act very sensibly provides that the truth shall be a defence to criminal as well as civil proceedings, whenever it is for the public benefit that the truth should be made known.

And in the same Act there is another minute change in procedure which has proved most beneficial to newspaper proprietors. Till 1843 the defendant in a civil action for libel could not pay money into court or plead that he had already apologised to the plaintiff. Sections 2 and 3 of the same Act of 1843 empowered the editor or proprietor of a newspaper to plead that he had before action or at the earliest opportunity afterwards apologised to the plaintiff, and also enabled him to make amends by paying money into court.

[1] 32 Geo. III. c. 60.
[2] 6 & 7 Vict. c. 96.

These are instances in which changes of procedure, apparently of a merely technical nature, have operated most beneficially, and have really changed the Substantive Law of the land.

No right is perfect unless the person on whom it is conferred has adequate means of enforcing it. If no sufficient remedy be provided by the law, the person aggrieved might resort to violence which, in the interests of society, cannot be permitted. An individual member of the State ought not, as a rule, to be entrusted with the power to remedy his own wrongs, and this for three reasons:

(i.) because he cannot safely be allowed to decide as to the fact of a wrong having been done to him;

(ii.) because he might lack the power of compelling compensation for it;

(iii.) because if he possessed the power, he might exercise it in an arbitrary manner or employ an unnecessary degree of force. The State, therefore, undertakes the task of determining the nature and extent of the right alleged to have been invaded, and of deciding whether or not a wrong has been done; it vindicates the party aggrieved against the aggressor, and assesses the amount of compensation due to him, or determines what other relief should be accorded to him. This is effected in most cases by an action at law.

### *Self-help.*

But there are certain cases in which a man is permitted to take the law into his own hands and enforce his rights himself without having recourse to litigation. Thus, as we have seen, a landlord may distrain on the goods of his tenant for rent in arrear.[1] And a creditor may in many cases enforce payment of the debt due to him by exercising a lien on the goods of his debtor which are in his possession.[2] So an executor or administrator may pay to himself out of the estate which he is administering, any debt due from the deceased to him in his own right.[3] But there are many other

[1] *Ante*, pp. 881—888.

[2] *Ante*, pp. 27, 28.

[3] If a creditor be made an administrator, he will have the same right, unless he relinquishes it—which he always does: *In re Belham*, [1901] 2 Ch. 52.

cases in which a man may enforce his rights without commencing an action. The most important of these we proceed to discuss in the following order:—

Self-defence.
Expelling a trespasser.
Removing goods improperly placed on one's land.
Re-entry by an owner on his land.
Recaption, or resuming possession of one's own chattel.
Abating a private nuisance.
Distress *damage feasant*.

The law permits a man in certain cases to repel force by force. If force be unlawfully used or threatened, which would harm a man, his wife, his child, or his servant, he may use such moderate degree of force as is reasonably necessary to repel the attack. But the force which he employs must be proportionate to that used by his assailant, and must not exceed that which is required by the necessity of the moment; otherwise he will himself become an aggressor. If the wrong-doer has desisted, there is no occasion and therefore no right to employ force against him; such force would not be in self-defence, it would be a counter-attack.[1] Similarly, if force be used to disturb a man in the peaceful possession of his land or goods, he is entitled to use force in defence of such possession.

The force used in resisting violence must be commensurate with the violence sought to be repelled. If, in defending his property, a man inflicts on the aggressor more damage than is necessary under the circumstances of the case, he is liable to an action. Thus, if a mastiff savagely attacks a spaniel, the owner of the spaniel is justified in beating off the mastiff with his stick, but not in killing him, unless he could not otherwise save his spaniel.[2] So a man is not justified in shooting a dog which is attempting to kill one of his fowls, unless the dog is in the very act of killing the fowl and cannot be prevented from doing so by any other means.[3]

Anyone who is in peaceful possession of a house or land is entitled to expel from it any person who trespasses thereon.

[1] *Reece* v. *Taylor* (1835), 4 Nev. & M. (K. B.) 469.
[2] *Wright* v. *Ramscot* (1667), 1 Saunders, 84.
[3] *Janson* v. *Brown* (1807), 1 Camp. 41. As to the right of a private citizen to arrest anyone who is in the act of committing a crime, see *ante*, pp. 471—473.

But he must first request him to depart, and then he may remove him, but only by gently laying hands upon him; if he is then resisted, it would seem that he in his turn may use sufficient force to overcome the resistance.[1] In some cases this right to prevent by force any violent invasion of one's house or property may amount to a right even to kill the intruder, *e.g.*, where he is breaking into a house by night with intent to steal the property therein, or to commit any other forcible and atrocious crime. And this right is not confined to the master of the house; his servants, other members of his family, and even strangers who happen to be present have the same right.[2] And where a person is lawfully in the house of another, still if he proceeds to commit a breach of the peace there, the owner or occupier of the house may gently lay hands upon him and eject him, using no more force than is necessary for that purpose.

Endeavouring to turn a man out of a house into which he has peacefully entered differs from resistance to a forcible attempt to enter in this respect. In the former case a request to leave is necessary before any force can be used to eject him: in the latter no such request is necessary. Thus, if A. forcibly enters upon B.'s land, B. may forcibly eject him; but if A. enters quietly B. must first request him to leave; if he refuses to do so B. may use sufficient force to remove him, and if A. resists he will be guilty of an assault.[3]

If a trespasser enters upon land and builds a house upon it, the owner may enter and pull down the house, although the trespasser is actually inhabiting it at the time.[4]

So if the goods of another be on A.'s land without his consent, it is his duty in the first place to communicate, if possible with the owner of the goods and request him to remove them. If they be not removed within a reasonable time after notice, still he has no right to destroy them or do any act which will seriously damage them, unless their presence on his land becomes a material inconvenience which prevents the use and enjoyment of his property; for such

[1] See *Dean* v. *Taylor* (1855), 11 Exch. 68; *Rimmer* v. *Rimmer* (1867), 16 L. T. 238.
[2] 1 Hale, 481, 484; Foster, 274; and see *ante*, p. 277.
[3] *Wheeler* v. *Whiting* (1840), 9 C. & P. 262, 265.
[4] *Davison* v. *Wilson* (1848), 11 Q. B. 890; *Burling* v. *Read* (1850), *ib.*, 904.

inconvenience would amount to a nuisance which he is entitled to abate;[1] but he is not bound to take any care of such goods; they lie there at the owner's risk. *À fortiori*, A. is not bound to take the trouble to return to B. any goods which he has wrongfully placed on A.'s land. But A. may do so if he thinks fit; and A.'s entering on B.'s land for the purpose merely of restoring to him his goods is no trespass.[2]

Thus, if a parcel be left by mistake at a man's house by a postman or carrier, it is his duty to return it to a postman or to that carrier. If, however, he does not know who left the parcel at his house, but it bears a name and address so that he knows for whom it was intended, then it is his duty before he destroys it to communicate with that person, and request him to fetch his goods away. And even if there is nothing on the parcel to show for whom it is intended, still he must keep it for a reasonable time in case inquiries should be made for it. But in either case, as soon as a reasonable time has elapsed, he is no longer bound to take any care of the goods.

The lawful owner of land of which another is in possession without right may enter on it, provided he is entitled by law so to enter and can do so peaceably.[3] But he may not effect such entry "with strong hand or multitudes of people." Such an entry was made a crime by an ancient statute.[4] Merely breaking open the door in the absence of the wrongful possessor will not prevent the entry being peaceable.[5] By such a peaceable entry the owner obtains once more possession of his land; and by virtue of his possession he may remove the former possessor, provided he can do so peaceably. Violence after entry in ejecting the former possessor is as much forbidden by the statute as forcible entry. So a landlord is justified in entering on the demised premises and expelling a tenant on the expiration of his term, provided no force be employed.[6]

Whenever a man has been wrongfully deprived of his goods

[1] See *post*, pp. 958, 959.
[2] *Rea* v. *Sheward* (1837), 2 M. & W. 424.
[3] *R.* v. *Wilson* (1835), 3 A. & E. 817, 824; *Harvey* v. *Bridges* (1847), 1 Exch. 261; *Upton* v. *Townend* (1855), 17 C. B. 30.
[4] 5 Rich. II., st. 1, c. 7; see *ante*, pp. 166, 442.
[5] *Turner* v. *Meymott* (1823), 1 Bing. 158.
[6] *Taunton* v. *Costar* (1797), 7 T. R. 431.

or chattels, he may reclaim and seize them wherever he finds them. Such a retaking is called "recaption." He may retake them wherever they may be, provided he does not thereby provoke a riot or a breach of the peace. "We will that every one shall have recourse to judgment rather than to force."[1] "If a man takes my goods and carries them on to his own land, I may justify my entry into the said land to take my goods again: for they came there by his own act;"[2] and he may use reasonable force for their recaption, if the wrongful possessor resists or refuses to restore his goods.[3]

If the taking away was felonious, the owner may even enter on the land of a third person to resume possession of his property, unless such third person has acquired a good title to the goods. If the taking was not felonious and the goods are now on the land of a third person (not the original taker), the owner must first demand his goods: if on demand they be refused, he may enter and take them. Again, if such goods come upon another's land by accident, *e.g.*, if a tree be blown down or fruit drop from a tree, the owner may enter on the other's land and resume possession of his property.[4] The same rule applies where loppings of trees necessarily fall on the land of another.[5]

Again, if a heriot be his by the custom of the manor, the lord of a manor may enter on a copyhold tenement on the death of a tenant to seize the heriot. So, too, by section 25 of the Larceny Act, 1861,[6] the owner of any land or fishery, or his duly authorised agent, may seize the tackle of any person whom he finds, between the beginning of the last hour before sunrise and the expiration of the last hour after sunset, unlawfully and wilfully angling there in contravention of section 24 of that Act. But if he does so the angler is expressly exempted from the payment of any damages or penalty for such angling. The lord of a manor or his

[1] Statute of Gloucester, 1278 (6 Edw. I. c. 8).

[2] Viner's Abridgment, Trespass, I. (a); cited by Parke, B., in *Patrick* v. *Colerick* (1838), 3 M. & W. at p. 485; and see *Burridge* v. *Nicholetts* (1861), 6 H. & N. 383.

[3] Such, at least, is the law laid down in *Blades* v. *Higgs* (1861), 10 C. B. N. S. 713; and see Pollock and Wright on Possession, at p. 115; Britton, vol. i., 57, 116. But this case is of very doubtful authority. It was, however, followed by Lord Russell, C.J., in 1898 in the unreported case of *Himmelspring* v. *The Singer Manufacturing Co.* But the law undoubtedly permits a man whose property has been stolen to follow the thief "in hot pursuit" and retake his property at once by force.

[4] See the remarks of Tindal, C. J., in *Anthony* v. *Haneys* (1832), 8 Bing. at p. 192.

[5] *Millen* v. *Hawery* (1624), Latch, 13.

[6] 24 & 25 Vict. c. 96.

authorised game-keeper may seize "all dogs, nets, and other engines and instruments" which are being actually used by uncertificated persons for the killing or taking of game within the manor.[1] He may also seize any game recently killed by any trespasser if it be not delivered up to him immediately on demand.[2]

Again, if it can be done without causing any risk of riot, a private nuisance may be abated by the party whom it injures. It has, however, been held that under certain circumstances notice must be given, before abating a private nuisance, to the person on whose land it exists.[3] "Where the person complaining of the nuisance could only get rid of it by going on to the soil of his neighbour; . . . he cannot justify going on to the soil of his neighbour to remove the nuisance except in a case of emergency, unless he has first given his neighbour notice to remove it."[4] But the person aggrieved need not give any notice to the offending party, if he can abate the nuisance without entering on that other's land. If, however, there is a question of right to be tried, the more reasonable course is to give notice.[5]

The law is not the same in the case of a public nuisance. It is true that Blackstone has laid down that "if a new gate be erected across the public highway, which is a common nuisance, any of the King's subjects passing that way may cut it down and destroy it."[6] But it is now clear law that, to justify a private individual in abating a public nuisance on his own authority, he must show that it did him a special injury; he can only interfere with it as far as may be necessary to exercise his right of passing along the highway with reasonable convenience and not because the obstruction happens to be there.[7] "A private individual can abate a nuisance" only "when necessary to exercise a right."[8]

[1] 1 & 2 Will. IV. c. 32, s. 13.
[2] *Ib.*, s. 36.
[3] *Jones* v. *Williams* (1843), 11 M. & W. 176.
[4] *Per* Lord Herschell, L. C., in *Lemmon* v. *Webb*, [1895] A. C. at p. 5.
[5] See the remarks of James, L. J., in *Commissioners of Sewers* v. *Glasse* (1872), L. R. 7 Ch. at p. 464.
[6] 3 Bla. Com. 5.
[7] See *Dimes* v. *Petley* (1850), 15 Q. B. 276; *Bateman* v. *Bluck* (1852), 18 Q. B. 870; *Roberts* v. *Rose* (1865), L. R. 1 Ex. 82.
[8] *Per* Cockburn, C. J., in *Arnold* v. *Holbrook* (1873), L. R. 8 Q. B. at p. 100.

In *Lemmon* v. *Webb*,[1] the House of Lords decided that, where branches of trees growing on A.'s land overhang the land of B., B. is entitled to remove those branches without notice to A., for the act of removing the branches is done on B.'s land and therefore does not involve a trespass. So it seems that any unlawful inclosure of a waste land may be abated by the commoners as a nuisance, provided that the removal of the encroachment can be effected without the risk of a breach of the peace.[2] Thus in *Perry* v. *Fitzhowe*,[3] where a cottage had been erected on a common, it was held that a commoner whose rights were thereby infringed need not give notice to the offending party before pulling down the cottage, unless it was in actual occupation. "An act done under such circumstances would probably be dangerous to human life and calculated in the highest degree to excite violence and breach of the peace. The law will not permit any man to pursue his remedy at such a risk."[4] In this case there was no allegation in the pleadings that notice had been given. It was afterwards held in *Davies* v. *Williams*,[5] on similar facts that a commoner, after notice and request to the offender to remove the house, may pull it down although the house is actually occupied at the time.

Although in all these cases, the person aggrieved may, if he thinks fit, take the law into his own hands and abate the nuisance, yet he is not bound to adopt this bold course; a timid or, shall we say, a prudent man will prefer to bring an action, and this course is open to him whenever his rights have been infringed. He is not bound to incur the trouble and expense which might be involved in abating the nuisance himself.[6]

We have already dealt with the right of a landlord to distrain the goods of his tenant for rent in arrear.[7] But there is another right possessed by the owner of land called distress of cattle, &c., *damage feasant*. This is "a remedy by which, if cattle or other things be on a man's land, encumbering it or otherwise doing damage there, he may summarily seize them without legal process, and retain them impounded as a pledge for the redress of the injury he has sustained."[8] It applies to inanimate, as well as to animate, things, such as

[1] [1895] A. C. 1. See *ante*, p. 501.
[2] *Per* Lush, J., in *Lascelles* v. *Lord Onslow* (1877), 2 Q. B. D. at p. 447.
[3] (1846), 8 Q. B. 757.
[4] *Per* Lord Denman, C. J., *ib.*, at p. 776.
[5] (1851), 16 Q. B. 546; approved in *Lane* v. *Capsey*, [1891] 3 Ch. 411. See also *Burling* v. *Read* (1850), 11 Q. B. 904, *ante*, p. 955.
[6] See *Smith* v. *Giddy*, [1904] 2 K. B. 448; *Crowhurst* v. *Amersham Burial Board* (1878), 4 Ex. D. 5.
[7] *Ante*, pp. 456—458, 881—888.
[8] Bullen, Distress, 257.

a locomotive,[1] or turves placed upon a common.[2] But things in actual use may not be distrained lest a breach of the peace should ensue.[3]

The distress may be made either during the day or night, but it must be made while the cattle are still actually trespassing or the goods are still encumbering the ground.[4] It can be made only for the amount of damage done at the time when it is levied.[5] But the same cattle can be distrained a second time for fresh damage if found trespassing again. But, if after A.'s cattle have been trespassing on B.'s land, A. regains possession of them before B. has notice of the damage which they have done, B. cannot enter A.'s land and forcibly seize the cattle; his only remedy is to bring an action for damages against A.

The right of distress is also given to enforce the recovery of other duties besides those in the nature of debt—for example, assessments and rates under special Acts of Parliament.

In many mercantile matters also the parties adjust their legal rights without having recourse to litigation. In some professions and trades there is a kind of "domestic tribunal," which settles disputes between the members arising out of any professional or trade matter. Thus the General Medical Council has power to deal with all charges of professional misconduct made against a registered medical practitioner; the Benchers of any Inn of Court have power to disbar any barrister of that Inn who has been guilty of professional misconduct.[6] The Discipline Committee of the Law Society is a statutory body, to whom is entrusted the duty of inquiring into any complaint against a solicitor and the power, if necessary, of moving the Court that he be struck off the rolls.[7] The Committee of the Stock Exchange has also stringent powers over its members.

[1] *Ambergate Ry. Co.* v. *Midland Ry. Co.* (1853), 2 E. & B. 793.
[2] *Bromhall* v. *Norton* (1682), Sir T. Jones Rep. 193.
[3] *Hoskins* v. *Robins* (1671), 2 Saunders, 320, 323.
[4] *Vaspor* v. *Edwards* (1701), 12 Mod. 658.
[5] *Wormer* v. *Biggs* (1845), 2 C. & K. 31.
[6] See *post*, Book VI., Chap. VIII., Barristers.
[7] See *post*, Book VI., Chap. VIII., Solicitors.

Again, in most partnership deeds, in most policies of life, fire, accident and marine insurance and in many other mercantile contracts, the parties voluntarily insert a provision that any dispute arising thereunder shall be submitted to arbitration, and not be made the subject of litigation. The clause usually states how the arbitrator is to be appointed; in some cases he is to be nominated by the chairman of the Chamber of Commerce or some other person of high standing and impartiality; in other cases, it is provided that each party shall appoint an arbitrator, and that the two arbitrators before entering on their work shall agree upon an umpire, who shall be called in if they differ, and whose decision shall be final. The procedure in such an arbitration is regulated by the Arbitration Act, 1889.[1] The arbitrator (or umpire) has full power to examine witnesses on oath or affirmation, and to compel the parties to produce books and documents. He has also full discretion with regard to costs. The proceedings are not public.

Such an arbitration is outside the Courts, yet it is to some extent under the supervision of the High Court. For instance, if the parties cannot agree upon an arbitrator, or the arbitrator or umpire refuses to act or becomes incapable or dies, either party may serve a notice upon the other to appoint and if the appointment is not made within seven days the Court may, on application, make the necessary appointment.[2] It can remove an arbitrator for misconduct and, if necessary, set the award aside.[3] The Court also has power to issue *subpœnas* to compel unwilling witnesses to attend before the arbitrator.[4] It can even extend the time agreed upon for his making the award.[5] Where an award is bad on the face of it, the Court may set it aside.[6] The arbitrator can also, if he chooses, state a case for the opinion of the Court on any point of law.

[1] 52 & 53 Vict. c. 49.
[2] *Ib.*, s. 5, and see s. 6.
[3] *Ib.*, s. 11.
[4] *Ib.*, s. 8.
[5] *Ib.*, s. 9.
[6] See *post*, p. 1174.

The award may be enforced in the same way as a judgment. The successful party applies by originating summons asking for "leave to enforce the award dated —— in the above arbitration in the same manner as a judgment or order to the same effect," and upon production of the award and a copy of it together with an affidavit verifying them the Master will make an order. The order must be drawn up before execution can issue upon it.

Should either party, contrary to his agreement, have recourse to litigation and issue a writ instead of appointing his arbitrator, the other party may, if he wishes, at once take out a summons under section 4 of the Arbitration Act, 1889, to stay all proceedings in the action. But he must do so promptly; he waives his right of objection, if, before applying for such a stay, he takes any step in the action which would be neither necessary nor useful if he intended to rely on his right to an arbitration.[1] Thus, if the defendant attends on the hearing of the plaintiff's summons for directions, or appeals from any order made against him, or applies for particulars or security for costs, or *à fortiori* delivers a defence, he takes a "step in the action." But merely writing to the plaintiff for further time to plead will not preclude the defendant from applying under this section.[2]

These arbitrations by consent must be carefully distinguished from compulsory references. A Master or Judge has power after an action has been commenced to order all matters in dispute in the action to be referred to an official or special referee, whether the parties consent to such a course or not, and although there is no arbitration clause in the contract between them. An official referee is an officer of the Court, whose duties are defined in a later chapter.[3] A special referee is a practising barrister or surveyor or other person, nominated by the parties to an action or by the Judge or Master after action brought. Such referee, whether official or special, has all the powers of an arbitrator mentioned above.[4]

If, however, the party aggrieved does not wish either to take the law into his own hands or to go to arbitration, he must have recourse to the law courts.

[1] See the remarks of Cave, J., in *Rein* v. *Stein* (1892), 66 L. T. at p. 471.

[2] But it will be otherwise, if he takes out a summons to the like effect: *Ford's Hotel Co.* v. *Bartlett*, [1896] A. C. 1. See Odgers on Pleading and Practice, 6th ed., at pp. 207, 208. As to an agreement to refer which wholly ousts the jurisdiction of the Court, see *post*, pp. 1118, 1119.

[3] *Post*, pp. 999—1002.

[4] 52 & 53 Vict. c. 49, ss. 13—17.

## Chapter II.

### THE HISTORY OF THE COURTS OF LAW.

We now draw a sharp distinction between Courts of civil and Courts of criminal jurisdiction. In the former, debtors are compelled to pay the money which they owe, and wrong-doers to compensate those whom they have injured; so that the proceedings, if successful, generally end in a judgment that the defendant shall pay the plaintiff so much money. The object of criminal proceedings, on the other hand, is to punish serious offences and to prevent their repetition. Hence these proceedings, if successful, terminate in a sentence inflicting fine or imprisonment on the offender or, in a few cases, even death. Civil and criminal proceedings, then, are essentially different both in their objects and in their results; and for each purpose our Courts hold distinct and separate sittings.

But this was not always so. In early times nearly all our Courts had jurisdiction over some matters which we should now classify as criminal, as well as over some which we should call civil. Indeed, in early times the distinction between a tort and a crime was not clearly understood. There was but little purely civil litigation. Violence was an element in most of the transactions of which the Courts took cognizance; and violence was treated as a crime or as a *quasi*-crime. Contracts of record or under seal, and contracts for the payment of a sum certain, were the only contracts which the Courts enforced in the reigns of our Norman and Plantagenet kings.[1] Most of their time was taken up with suits relating to land and the services due to the king or some other lord in respect of land.

[1] The action of *assumpsit*, though not unknown in the days of Henry VI., did not come into general use till the reign of Henry VII.

At the time of the Norman conquest the most important tribunal in England was the Shire-gemôt or County Meeting. This Court took cognizance of felonies, breaches of the peace, nuisances and other offences which concerned the State, as well as of actions involving title to lands and other civil suits which concerned only the individual suitors; it also heard appeals from inferior tribunals, such as the hundred court. In Saxon times the county court met twice or thrice a year. In the thirteenth century in the larger counties it met every month.

Under Henry II. the royal power made itself felt throughout the kingdom. His justices *in eyre* made their circuits through the land, and tried the more important civil and criminal cases in the county court, which on these occasions assembled in full session to meet them. Dugdale tells us that this was done "to the end that the people might have justice with more ease administered to them upon all occasions, and consequently the better attend their domestick affairs."[1] The king's judges came down into the county to try the cases in the county court, because the jurisdiction to deal with crimes was essentially local. Every prisoner was entitled to be tried by a jury drawn from the county in which the offence was committed; and this, indeed, in the absence of an express statute, is still the law.

By the Assize of Clarendon, 1166, all landowners were obliged to attend twice a year to meet the king's justices. This was the origin of the county Assizes. To this day the king's judges still come at least thrice a year into every county in England. To the larger counties two judges come together, one of whom tries civil causes and the other criminal cases. All indictable offences, whether treasons, felonies, or misdemeanours, can be tried at the Assizes; so can any action, which can be brought in the King's Bench or Chancery Divisions of the High Court of Justice.

Each county had from the earliest times two officers—the shire-reeve or sheriff, and the coroner. Each of these officers

[1] *Origines Juridiciales*, p. 51.

had his own court, apart from the county court. In every hundred of a county a "court leet" was held at least once a year, and the sheriff also held his "tourn," which was the grand court leet for the county. Both these courts had a limited criminal jurisdiction; in both "a view of frank-pledge" was taken.[1] Moreover, in each county there were many manors. A manor was a tract of land which had been granted to one man (called "the lord of the manor"), and portions of which were held under him by freehold and copyhold tenants, over whom he had jurisdiction in minor matters both civil and criminal to the exclusion of the hundred court. The freehold tenants were bound to attend the court baron of the manor; the copyhold tenants were bound to attend the customary court. In many manors there was also held a court leet over which the lord, or in his absence the steward, of the manor presided.

Wholly apart from these petty local courts, certain of the landed gentry were from time to time appointed in the interests of the public safety to be "conservators of the peace." They were at first chosen by the freeholders of the county, but after 1327 by the Crown.[2] Then, in 1360, "justices of the peace" were appointed by the king for each county. Under the statute 34 Edw. III. c. 1, the primary duty of these officers was, as their name indicates, to preserve the peace. Larger powers, however, were from time to time assigned to them by the king in their "commission"—by what authority is not clear.[3] The form of the commission of justices of the peace was settled by the judges in the time of Queen Elizabeth; it has remained substantially the same ever since, and its validity cannot now be questioned. A vast number of modern statutes have enormously increased the jurisdiction of justices of the peace, who now regularly hold their petty sessional courts in every division of each county.[4]

[1] The sheriff's tourn was abolished in 1887; but a court leet is still held in many manors and in a few boroughs.

[2] There is much learning as to conservators of the peace in the exhaustive judgment of Lord Camden, C. J., in *Entick* v. *Carrington* (1765), 19 St. Tr. 1030.

[3] See the remarks of Lord Denman, C. J., in *R.* v. *Dunn* (1840), 12 A. & E. at p. 617.

[4] See *post*, p. 978.

From the great meetings of the county court at which the king's justices *in eyre* were present sprang, as we have seen, the Assizes. But the ordinary meetings of the county court, which the king's justices did not attend, still continued; and at these, though the sheriff presided, all the freeholders of the county were still in theory the judges. Edward III., however, who appointed justices of the peace for each county, enacted that they should meet at least four times a year;[1] and the ordinary meetings of the county court appear soon to have merged in, or been extinguished by, these quarterly meetings of justices, which we now know as the Quarter Sessions of the Peace. Words were inserted in the commission of justices of the peace authorising any two or more of them[2] to "hear and determine all and singular the felonies, poisonings, inchantments, sorceries, arts magic, trespasses, forestallings, regratings, ingrossings, extortions, unlawful assemblies, indictments . . . and the same offenders, and every one of them, for their offences . . . to chastise and punish. . . . Provided always, that, if a case of difficulty upon the determination of any of the premises before you, or any two or more of you, shall happen to arise, then let judgment in nowise be given thereon before you, and any two or more of you, unless in the presence of one of our justices of the one or other bench, or of one of our justices appointed to hold the assizes in the aforesaid county."[3] The court of quarter sessions, it will be observed, was not to encroach upon the assizes.

And at the present day the courts of quarter sessions cannot try any crime, which is punishable with death or imprisonment for life (except burglary); other grave offences, such as perjury and forgery, are also excepted.[4] These sessions are held at least four times a year in each county. The justices of the peace for the county—unpaid laymen—are the judges.

[1] 25 Edw. III. st. 1, c. 7; 36 Edw. III. st. 1, c. 12.

[2] Provided one was of the *quorum*, *i.e.*, one of certain senior justices specially named in the commission.

[3] See the form of the commission in Burn's Justice of the Peace, 30th ed., Vol. III., pp. 111, 112; and in Dickinson's Quarter Sessions, 5th ed., p. 65.

[4] See *post*, p. 983.

As soon as the doctrine of the king's peace became established, any crime which the prosecutor could reasonably allege to be "against the peace of our lord the king," had to be tried either at the Assizes or in the court of quarter sessions; the sheriff could no longer deal with it in the ancient county court, which therefore gradually fell into disuse for criminal purposes. And after the statute of Gloucester, 1278, no civil case could be tried there, if the amount claimed exceeded 40*s*. The ancient county court, however, still continued to assemble for civil purposes; but its jurisdiction had become almost obsolete, when the County Court Act of 1846[1] was passed. This Act created the modern county court which is held in every town of any size in England at least six times a year, and has a limited jurisdiction in civil cases.[2]

So much for the counties. But even in Anglo-Saxon times, cities such as Winchester, York and London had acquired the right of holding courts of their own. In these courts an officer appointed by the citizens themselves decided all civil disputes which arose within the limits of the city, and also exercised some criminal jurisdiction over the citizens. In less important towns, however, it was found difficult to exclude the jurisdiction of the county court. But in the thirteenth and fourteenth centuries the policy of the Crown was to strengthen the towns in order to create a counterpoise to the power of the nobles.[3] The three Edwards and Richard II. granted to many boroughs and to a few other privileged areas (called "liberties") charters, which created courts of criminal and in some cases also of civil jurisdiction. The citizens were proud of these local courts, for they were a badge of their independence. Some of them have fallen into disuse; from the others are directly descended our present Borough Courts of quarter sessions[4] and our Civil Borough Courts of Record.[5]

[1] 9 & 10 Vict. c. 95.
[2] See *post*, pp. 1021 *et seq.*
[3] For a brief history of the rise of the boroughs, see Odgers on Local Government, 2nd ed., pp. 70—80.
[4] See *post*, pp. 982, 983.
[5] See *vost*, p. 1027.

Courts of Borough quarter sessions are now held in 131 of our larger cities and towns. As their name indicates, they are held at least four times a year, and have the same criminal jurisdiction and adopt the same procedure as the court of quarter sessions in a county. The judge of each of these courts is called a Recorder. In eighteen of these cities or towns there is also held a Borough Court of Record of civil jurisdiction — such, for instance, as the Mayor's Court, London, the Court of Passage at Liverpool, the Salford Court of Record, and the Tolzey Court at Bristol. The jurisdiction of these courts is generally limited to causes of action arising within the borough, but unlimited as to the amount which can be claimed in the action.[1] Of most of them the Recorder of the borough is the judge. The Universities of Oxford and Cambridge have each its own court, over which the Vice-Chancellor presides.

When our Plantagenet kings were firmly established on the throne, judicial power became more centralised. The King's Council gradually extended the scope of its operations. It acquired important judicial functions; it became a court in which the king, in theory, was always present. From this council sprang the Courts of King's Bench, Common Pleas and Exchequer, which for many centuries were the three superior courts of common law at Westminster.

Then as time advanced new cases arose which did not fall within the rigid rules of the common law. Jurisdiction over these cases was given to the Lord Chancellor, lest wrongs should be left without a remedy. With the history of the Court of Chancery we have already briefly dealt.[2] This Court, in the reign of Queen Elizabeth, assumed a further jurisdiction; it began to restrain suitors from "unconscientiously" enforcing their strict legal rights. It thus acquired a control over the three courts of law at Westminster. And in fact from that time onward two systems of judicature flourished side by side, which were in many respects at

[1] See *post*, pp. 1027—1029.
[2] See *ante*, pp. 55—57.

variance with each other. Indeed, a plaintiff often obtained judgment in a court of law on a set of facts, upon which he had been utterly defeated in a court of equity, and it sometimes happened that parties in the course of the same litigation were driven backwards and forwards from courts of equity to courts of law.[1]

Nor did harmony always prevail between the three courts of common law at Westminster. Each had its own procedure, each its exclusive jurisdiction. The Court of Exchequer had an equitable jurisdiction; but this was eventually transferred to the Court of Chancery.[2] It is impossible to trace here the history and development of these Courts or to describe the fictions by which the Courts of King's Bench and Exchequer filched actions from the Court of Common Pleas. All necessity for such devices was at last removed by the Uniformity of Process Act, 1832,[3] which gave to all three superior courts at Westminster collateral jurisdiction over suits between private persons which originally had belonged exclusively to the Court of Common Pleas. It also simplified and harmonised the procedure of all three courts, though certain matters still remained within the exclusive cognisance of each. Further efforts in this direction were made by the Common Law Procedure Acts, 1852, 1854 and 1860.[4]

Again, by the end of the eighteenth century the Court of Chancery had become more technical, if that were possible, than the courts of common law themselves. Its procedure had ceased to be elastic; it would only grant relief in certain specified cases. A plaintiff, who had undoubtedly a strong moral claim, was constantly told that he had no equity. Cumbrous procedure, technical pleadings and preposterous rules of evidence caused the suitors much vexation of spirit, much unnecessary expense and, worst of all, intolerable delay. "Lord Eldon and the Court of Chancery pressed heavily upon mankind." Attempts were made from time to time to deal

[1] See Report of the Chancery Commission, 1852, pp. 1, 3.
[2] 5 Vict. c. 5; and see Younge & Collyer's Reports in Equity.
[3] 2 Will. IV. c. 39. This Act created the modern writ of summons.
[4] 15 & 16 Vict. c. 76; 17 & 18 Vict. c. 125; 23 & 24 Vict. c. 126.

with this state of things by legislation, notably by the Master in Chancery Abolition Act and the Chancery Procedure Act, both of 1852,[1] and the Consolidated Orders in Chancery of 1845 and 1860.

The ancient county courts, though retaining in theory some small civil jurisdiction, were almost obsolete before the commencement of the nineteenth century. Their place had in certain localities been taken by Courts of Requests, established by Act of Parliament at the special request of the inhabitants.[2] By the year 1800, fifty-four such Courts were established by fifty-four separate Acts of Parliament, the first of which was passed in the reign of James I. These Courts collected small debts only; they were of very varying degrees of efficiency; they had only a limited jurisdiction; and were wholly inadequate to the needs of the provinces. There were also in existence courts leet and courts baron, which still possessed some civil jurisdiction in cases concerning land.

It is largely to the influence of Jeremy Bentham that we owe our present county court system. He warmly and constantly advocated the establishment of local courts within at the very least half-a-day's journey from the home of every individual—courts which should be readily accessible in every month of the year and which should deal out every kind of justice to the local suitors. Each court, he urged, should consist of a single judge, a trained lawyer, who should be responsible for every step of the proceedings from beginning to end, and have all necessary powers vested in him for that purpose. Such was Bentham's dream; but it was not till Queen Victoria was on the throne that any court of the kind was called into existence. The legal profession, almost to a man, ignored Bentham and all his works; they regarded him merely as an elderly gentleman full of visionary schemes which he duly expounded in very bad English. But in the year 1833, a Royal Commission recommended the establishment of a general system of local courts for the recovery of

[1] 15 & 16 Vict. cc. 80, 86.

[2] These Courts must be distinguished from the ancient Court of Requests, which came into existence in the reign of Henry VII., and was abolished in 1640.

small debts. Several abortive attempts were made in successive years to carry this recommendation into effect. This was at last accomplished by Lord Cottenham, who, as Lord Chancellor, introduced the Act of 1846, which created the modern county courts.[1] Though they were called county courts, they did not adopt either the constitution or the procedure of the ancient county court (the oldest of our law courts). At first, these new courts had jurisdiction only in common law cases where the amount in dispute did not exceed £20, and even as to these there were several important exceptions. In 1850 the limit was raised to £50,[2] and more effectual means were taken to deter plaintiffs from bringing petty cases into the superior courts. In 1856 the county courts were enabled to try almost any question by consent of both parties; while, on the other hand, a case within the limits might be removed into a superior court at the will of the defendant on his giving security for costs. In 1857 their jurisdiction was extended to actions relating to wills or intestacy, where the property in dispute did not exceed £200 if personal, £300 if real. In 1865 they were empowered to deal with equitable claims of every kind, so long as the amount involved did not exceed £500. Later Acts have added jurisdiction in bankruptcy and in some districts in Admiralty. Thus slowly have been built up the county courts of to-day, which are an inestimable boon to our poorer suitors.

Until the middle of the last century there also flourished in England and Wales many Ecclesiastical Courts. Chief among these were the Prerogative Court for wills and administrations, the Court of Arches for appeals from inferior Ecclesiastical Courts in the Province of Canterbury, the Court of Peculiars (a branch of the Court of Arches), a Faculty Court, which granted dispensations to marry, and a Court of Delegates for ecclesiastical affairs. Most of these were held at Doctors' Commons, which lay close to St. Paul's Cathedral. There was also a Consistory Court in each diocese except that of

[1] 9 & 10 Vict. c. 95.
[2] It is now £100 : see *post*, p. 1022.

Canterbury. But in 1857 the Ecclesiastical Courts were shorn of their most important functions. Their jurisdiction as to wills and as to the distribution of personal property on intestacy was transferred to a newly created Court of Probate;[1] some subordinate jurisdiction was, as we have seen, vested in the county courts. At the same time, the jurisdiction of the Ecclesiastical Courts in matters arising between husband and wife was transferred to the new Court of Divorce and Matrimonial Causes.[2] So that now the Ecclesiastical Courts deal only with clergymen of the Established Church in their professional character.[3]

A hundred years ago there was no Bankruptcy Court in England; for bankruptcy was unknown to the common law; it is purely the creation of statute. If a man could not pay his debts, he was imprisoned until some person paid them for him. In the early part of the nineteenth century, however, various statutes were passed for the relief of insolvent debtors. At first all business under these statutes was entrusted to commissioners appointed separately for each case by the Lord Chancellor. A number of permanent commissioners were appointed in 1831 for the London district, and afterwards for county districts also, each of whom could act separately, when once set in motion by the *fiat* of the Lord Chancellor, but subject to the control, first of a Court of Review in Bankruptcy, and afterwards of one of the Vice-Chancellors. This arrangement was considerably modified in 1861, and in 1869 imprisonment for debt was abolished altogether, except in the case of a dishonest person who can pay his debts, but refuses to do so. In the same year the commissioners were all abolished; bankruptcies in the country were transferred to the county courts, and a new court was created to deal with bankruptcies in London, which was called the London Court of Bankruptcy.[4]

[1] Court of Probate Act, 1857 (20 & 21 Vict. c. 77); amended by 21 & 22 Vict. c. 95.
[2] Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85).
[3] See *ante*, p. 205.
[4] The jurisdiction of this Court was transferred to the Supreme Court of Judicature in 1883, by the Bankruptcy Act of that year (46 & 47 Vict. c. 52, ss. 92—94), and is exercised by the High Court of Justice.

At last, in 1873, Lord Selborne, then Lord Chancellor, with the assistance of Lord Cairns, his opponent in politics, carried successfully through Parliament the Judicature Act,[1] which created the Supreme Court of Judicature. This Court consists of the High Court of Justice, and the Court of Appeal, both of which are Superior Courts of Record. To the High Court of Justice was transferred every jurisdiction which had formerly been vested in, or capable of being exercised by, any of the following Courts:—

(1) The High Court of Chancery, as a common law Court as well as a Court of Equity, including the jurisdiction of the Master of the Rolls, as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law Court;
(2) The Court of Queen's Bench;
(3) The Court of Common Pleas at Westminster;
(4) The Court of Exchequer, as a Court of Revenue, as well as a common law Court;
(5) The High Court of Admiralty;
(6) The Court of Probate;
(7) The Court for Divorce and Matrimonial Causes;
(8) The Court of Common Pleas at Lancaster;
(9) The Court of Pleas at Durham;
(10) The Courts created by Commissioners of Assize, of Oyer and Terminer and of Gaol Delivery, or any of such Commissioners;[2]

and subsequently in 1883—

(11) The London Court of Bankruptcy.

To the Court of Appeal were transferred all jurisdiction and powers of the following Courts:—

(1) The Court of Appeal in Chancery;
(2) The Court of Appeal in Chancery of the County Palatine of Lancaster;
(3) The Court of the Lord Warden of the Stannaries;

[1] 36 & 37 Vict. c. 66. This Act did not come into force till November 2, 1875.
[2] *Ib.*, s. 16.

(4) The Court of Exchequer Chamber;

(5) The Judicial Committee of the Privy Council upon appeal from any judgment or order of the High Court of Admiralty;

and many other minor appellate jurisdictions.

The High Court of Justice now consists of three Divisions:—

The King's Bench Division.

The Chancery Division.

The Probate, Divorce and Admiralty Division.

Originally by the Judicature Act each of the three Superior Courts of common law was made a separate division of the High Court of Justice, but by an Order in Council dated December 16th, 1880, the Common Pleas and Exchequer Divisions were merged in the Queen's Bench Division, and the offices of Lord Chief Justice of the Common Pleas Division and Lord Chief Baron of the Exchequer Division abolished.

Each Division of the High Court is clothed with every jurisdiction and power possessed by the Courts which were merged in it by the Judicature Act. That Act enabled the Courts of common law to give, in addition to the ordinary legal remedies, any relief which the Court of Chancery could formerly have given.[1] Law and equity are now administered concurrently. Every Court applies the same principles of law and equity to the actual facts of the case; every Court has power to grant whatever form of relief the nature of the case may require, whether legal or equitable. This was the greatest and most beneficial law reform of the long reign of Queen Victoria. On December 4th, 1882, outward expression was given to the fusion of law and equity by physically uniting the Courts in one building—the Royal Courts of Justice.

Prior to the year 1908 a person who was convicted of a crime had no right of direct appeal. If the prisoner was acquitted, there was an end of the proceedings; he could

[1] See the judgment of Lord Watson, in *Ind, Coope & Co.* v. *Emmerson* (1887), 12 App. Cas. at p. 308.

never be placed on his trial again for the same offence. Moreover, a prisoner had always many opportunities of raising any point of law. On his arraignment he could demur to the indictment. At any stage of the proceedings before verdict he could move to quash the indictment. After verdict he could move in arrest of judgment. And even after judgment, if the defect on which he relied appeared on the face of the record, he might apply to the Attorney-General for leave to issue a writ of error, which could be argued in the Court of King's Bench (or later in the King's Bench Division), and taken thence even up to the House of Lords.[1] But if there was no point of law which the prisoner could raise in his defence, and the jury found him guilty on the facts, their decision was final. He could obtain no new trial;[2] nor could he appeal against the severity of his sentence. His only chance was that the Home Secretary might possibly be induced to advise the King to pardon him altogether or to remit some portion of his punishment.

It sometimes happened that a judge had to decide a point of law on circuit, away from his books. He might come to the conclusion that, if certain facts were proved to the satisfaction of the jury, the prisoner had committed a crime, and he would then direct the jury, on proof of those facts, to find the prisoner guilty. Should the judge, however, have any doubt as to the correctness of his decision, he would often, after sentencing the prisoner, suspend punishment until he had consulted his brother judges at Serjeants' Inn. Then, in the year 1848, a judge was empowered by statute[3] to "state a case"—that is, to briefly state the facts on which the point of law arose—for the opinion of a Court which was created in that year, and known as the Court for the Consideration of Crown Cases Reserved. If he thought fit to do so, sentence was usually passed, but respited until the point of law was decided on the case stated. If the Court

[1] See, for example, *R.* v. *Bradlaugh and Besant* (1877), 2 Q. B. D. 569; (1878), 3 Q. B. D. 607.

[2] Except in the case of a misdemeanour tried at bar in the Court of King's Bench.

[3] The Crown Cases Reserved Act, 1848 (11 & 12 Vict. c. 78).

for Crown Cases Reserved thought that the point of law had been wrongly decided at the trial, the verdict would be set aside and the conviction quashed. But a case could only be stated on a point of law; and there was no power, even on a point of law, to compel a judge to state a case if he declined to do so. No Court, moreover, had any power in a criminal case to review or vary the finding of a jury on any question of fact.

This state of things led to the passing of the Criminal Appeal Act, 1907.[1] This Act created the Court of Criminal Appeal, which is a Superior Court of Record. The Act abolishes the writ of error and the Court for Crown Cases Reserved.[2] It is still, however, possible for a judge, a recorder, or chairman of quarter sessions to state a case for the opinion of the Court of Criminal Appeal; and a prisoner can still, at successive stages of his trial, demur, move to quash the indictment, or move in arrest of judgment, but in actual practice he now invariably appeals.

[1] 7 Edw. VII. c. 23. This Act came into operation on April 19, 1908; it does not extend to Scotland or Ireland.

[2] *Ib.*, s. 20.

## Chapter III.

### Criminal Courts.

Our ordinary criminal Courts are now:—

1. Courts of Petty Sessions.
2. Courts of Quarter Sessions.
3. The Assizes.
4. The Central Criminal Court.
5. The King's Bench Division of the High Court of Justice.
6. The Court of Criminal Appeal.

Peers who are charged with treason, felony, or misprision are tried either in—

7. The House of Lords, or
8. The Court of the Lord High Steward.

Appeals in criminal matters from the Channel Islands, the Isle of Man, the Empire of India, and the Colonies are heard by the Judicial Committee of the Privy Council, which advises the King thereon.

### 1. *Courts of Petty Sessions.*

These Courts are composed of justices of the peace, whose office dates, as we have seen, from 1327.[1] The executive powers of a justice of the peace rest in the main upon the terms of his commission from the King, which empowers him singly to conserve the peace, to suppress riots and affrays, to take security for keeping the peace, and to apprehend criminals. The judicial functions of justices of the peace, on the other hand, are almost entirely the creation of statute law. The procedure in their Courts is regulated by the Summary Jurisdiction Acts, 1848 to 1899.[2]

[1] See *ante*, p. 965.

[2] 11 & 12 Vict. c. 43; 42 & 43 Vict. c. 49; 47 & 48 Vict. c. 43; 58 & 59 Vict. c. 39; 62 & 63 Vict. c. 22.

Justices of the peace are appointed by the Crown, on the recommendation of the lord-lieutenant; they no longer need any property qualification.[1] There is no limit to the number of justices that may be appointed in any county. They are unpaid; they elect their own chairman. They hold office for life, but may be removed for misconduct by the Lord Chancellor. A justice is appointed for the whole county; but, except in quarter sessions, he only acts in practice in the petty sessional division in or near which he resides. Any two or more justices acting in their own division, and sitting in their usual court-house, form a Court of petty sessions.[2]

Modern statutes have very largely increased the powers of justices of the peace. They have now an extensive jurisdiction over a most miscellaneous collection of matters both civil and criminal. This jurisdiction has, no doubt, been conferred on them because they are the most readily accessible of our judicial officers, and the proceedings before them are short, simple, and inexpensive. Their jurisdiction is threefold:—

(i.) They deal with many civil or *quasi*-civil matters, such as disputes concerning contracts between master and servant, affiliation orders, &c. These proceedings begin with a complaint, not on oath, and if successful end in an order to pay money, which creates merely a civil debt. The defendant can be compelled to give evidence at such proceedings.[3]

(ii.) Justices have also power to deal summarily with many minor criminal matters. In such cases they decide whether the accused is guilty or not without the aid of any jury. These proceedings begin with an information and end, if successful, in a conviction. The accused may give evidence if he wishes, but he cannot be compelled to do so; indeed, the justices may, if they think fit, proceed in his absence.

(iii.) Justices also do much valuable work in connection with cases which will subsequently be tried by a jury on an indictment. These proceedings begin with an information and, if successful, end with a committal. The justices do not decide

[1] See Justices of the Peace Act, 1906 (6 Edw. VII., c. 16).
[2] This is an inferior Court, not of Record; see *post*, p. 1021.
[3] See further as to the civil jurisdiction of justices of the peace, *post*, pp. 1033–1035.

whether the accused is guilty or not of the offence with which he is charged, but send the case to be tried by a jury either at assizes or quarter sessions. It is only in proceedings of this kind that the depositions of witnesses are taken. The accused must be present; he can, if he wishes, give evidence on oath, or make an unsworn statement from the dock; and in either case he can call witnesses, whose depositions will be also taken.

In all three classes of cases the justices have power to summon the defendant and any necessary witness before them and, if the summons be disregarded, to compel his attendance by issuing a warrant for his apprehension.

One justice can conduct a magisterial investigation preliminary to the trial of an indictment; two justices are necessary to decide a case summarily. A Court of petty sessions is usually held at regular intervals in a stated place. A magisterial investigation, on the other hand, can be held at any time at any place within the justices' jurisdiction. In trying a case summarily, the justices sit in open Court and the proceedings are public, whereas in conducting a magisterial investigation they are strictly not sitting as a Court and the public have, therefore, no positive right to be present, though they are almost invariably admitted. In the metropolis there are police magistrates, and in some of the larger provincial towns a stipendiary magistrate has been appointed. A police or stipendiary magistrate, and also any alderman of the City of London, sitting alone, has all the powers of a Court of summary jurisdiction composed of two justices of the peace.

The Children Act, 1908,[1] contains certain provisions regulating the hearing of a charge against a juvenile offender, *i.e.*, a child or young person under sixteen years of age. It enacts that the Court must sit either in a different building or room from that in which its ordinary sittings are held, or on different days or at different times from those at which its ordinary sittings are held, and that provision must be made for preventing persons apparently under the age of sixteen from associating either before or after their attendance in Court with adult offenders not charged jointly with the juvenile.[2] Again, unless with the leave of the Court, no person

[1] 8 Edw. VII. c. 67.
[2] *Ib.*, s. 111.

may attend the hearing, except the Court officials, the parties and their advocates, other persons directly concerned in the case, and *bonâ fide* representatives of a newspaper or newsagency.[1] Moreover, whilst a juvenile gives evidence in relation to an offence against, or any conduct contrary to, decency or morality, the justices may clear the Court of all persons other than the officials, the parties and their advocates, and persons otherwise directly concerned in the case. But *bonâ fide* representatives of the Press may not be excluded.[2] Lastly, no children, save infants in arms, messengers, clerks, and other persons required to attend for purposes connected with their employment, may be present during the trial of any other person, or during any proceedings preliminary thereto.[3]

From any summary conviction or order made by a Court of petty sessions an appeal may lie either to the Court of quarter sessions or to the King's Bench Division. The former Court will re-hear the whole case and decide all questions both of fact and law; the latter Court will only hear arguments on a point of law. But no appeal lies from the decision of a justice of the peace committing any person charged with crime to take his trial on indictment at the assizes or quarter sessions.

(i.) A person convicted at petty sessions had at common law no right of appeal to the Court of quarter sessions, but this right has been conferred upon him by statute in a great variety of cases.[4] For instance, a person has a right to appeal who has been summarily convicted of an offence against either the Larceny Act, 1861,[5] or the Malicious Injuries to Property Act, 1861,[6] if he has been sentenced to a fine of £5, or imprisonment for more than one month, or was convicted by one justice alone. So, too, by the Summary Jurisdiction Act, 1879,[7] any person sentenced by a Court of petty sessions to imprisonment without the option of a fine may appeal to quarter sessions against his conviction, unless he pleaded guilty in the Court below. But a person, who is charged before justices with an indictable offence under section 12 of

[1] 8 Edw. VII. c. 67, s. 111.
[2] *Ib.*, s. 114.
[3] *Ib.*, s. 115.
[4] In a few cases, where the offence is not indictable, the prosecutor also can by express statute appeal if the prisoner is acquitted.
[5] 24 & 25 Vict. c. 96, s. 110.
[6] 24 & 25 Vict. c. 97, s. 68.
[7] 42 & 43 Vict. c. 49, s. 19.

that Act and elects to be dealt with summarily, has no right of appeal if he be convicted.[1]

The appeal must be made to the Court of quarter sessions which will be held next after the conviction, unless that will be held within fifteen days, in which case the appellant may postpone his appeal to the next subsequent Court.[2] The appellant must give notice in writing of his intention to appeal within seven days after his conviction to the other party, and to the clerk of the petty sessional Court; such notice must state the grounds of the appeal.[3] He must further, within three days after his notice of appeal, enter into recognisances before the petty sessional Court to prosecute the appeal and abide the result thereof.[4] Pending the hearing of the appeal the appellant may be released on bail, if the Court think fit, on entering into recognisances or giving security.[5]

(ii.) Again, a person convicted at petty sessions may apply to the King's Bench Division for a writ of *certiorari* on the ground that—

(a) there is some defect or informality apparent on the face of the proceedings before the justices, or

(b) there was a want of jurisdiction on their part or that they exceeded their jurisdiction, or

(c) the conviction was obtained by fraud.

If such writ be granted, the proceedings will be brought before the King's Bench Division, which will if necessary quash the conviction.[6] Again, any person, who desires to question his conviction at petty sessions on the ground that it is erroneous in point of law, or is in excess of jurisdiction, can apply[7] to the justices to state a case setting forth the facts for the opinion of the King's Bench Division. If they refuse to do so, he may apply to the King's Bench Division for an order directing them to state a case.[8]

It will be observed that both these alternative methods are

[1] *R.* v. *Justices of London*, [1892] 1 Q. B. 664.
[2] 42 & 43 Vict. c. 49, s. 31 (1).
[3] *Ib.*, s. 31 (2); notice to the solicitor of the other party is not sufficient: *R.* v. *Justices of Oxfordshire*, [1893] 1 Q. B. 149.
[4] *Ib.*, s. 31 (3).
[5] *Ib.*, s. 31 (4).
[6] See Crown Office Rules, 1906, and Short & Mellor's Crown Office Practice, p. 114.
[7] Such application must be made in writing within seven days of conviction: 42 & 43 Vict. c. 49, s. 33.
[8] 20 & 21 Vict. c. 43, s. 2; 42 & 43 Vict. c. 49, s. 33.

applicable only where the question which the appellant desires to raise is one of law.

### 2. *Courts of Quarter Sessions.*

Every Court of quarter sessions, whether of a county or a borough, is an inferior Court of Record. We have already traced the history of this Court in the counties, where it gradually superseded the ancient county court so far as criminal cases were concerned.[1] All the justices of the county are judges of the Court of quarter sessions for their county, though it is sufficient if two justices be present. If the business of the county requires it, the Court sits in two divisions, each of which is composed of at least two justices.[2] The Court is presided over by a chairman appointed by the justices; a deputy chairman is also appointed who presides in the second Court. The Court tries on indictment prisoners committed for trial by the various Courts of petty sessions for the county. It originally had jurisdiction over all indictable offences except in "cases of difficulty," which were referred to the judge of assize.[1] But this somewhat indefinite jurisdiction is now, as we shall see, restricted.

In boroughs there was great variety both as to the jurisdiction of the local Court of quarter sessions, and as to the persons who composed it; for these matters were defined for each borough by the terms of its own charter. The judge of a borough Court of quarter sessions is called a Recorder. He is the sole judge of the Court, for although the justices of the peace for the borough are often present on the bench, they take no part in the proceedings. A recorder is appointed by the Crown on the recommendation of the Home Secretary. He must be a barrister of not less than five years' standing. He is *ex officio* a justice of the peace for the borough, and he may sit in Parliament for any other constituency, but not for the borough of which he is recorder.

The officer of every Court of quarter sessions is the clerk

[1] See *ante*, p. 966.
[2] 22 & 23 Vict. c. 73, s. 9.

of the peace. In a county he is appointed by the standing joint committee of the county justices and the county council, and is removable by that committee.[1] In a borough he is appointed by the town council of the borough, and is removable by the recorder.[2]

The jurisdiction of all Courts of quarter sessions, whether for a county or a borough,[3] was regulated and made uniform by the Court of Quarter Sessions Act, 1842,[4] and subsequent Acts, which created new offences, have in some cases excepted them from the jurisdiction of Courts of quarter sessions.

The Act of 1842 provides that justices of the peace at their Court of quarter sessions shall not try any person for any treason, murder or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by penal servitude for life, with the exception of burglary, which has been brought within its jurisdiction by a recent statute.[5] Nor can they try any of the following offences:—Misprision of treason; offences against the King's title, prerogative, person or government, or against either House of Parliament; offences subject to the penalties of *præmunire*; blasphemy and offences against religion; administering or taking unlawful oaths; perjury and subornation of perjury; suborning any person to make a false oath, affirmation or declaration punishable as perjury or as a misdemeanour; forgery; unlawfully and maliciously setting fire to crops of corn, or to any part of the wood, coppice, &c.; bigamy and offences against the laws relating to marriage; abduction of women and girls; endeavouring to conceal the birth of a child; composing, printing or publishing blasphemous, seditious or defamatory libels; bribery; unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person; stealing or fraudulently taking or injuring or destroying records or documents belonging to any Court of law or equity, or relating to any proceeding therein; stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate, or any interest in lands, tenements or hereditaments.

By other statutes justices in quarter sessions are precluded from trying:—the misdemeanour of three or more armed persons being in pursuit of game by night;[6] fraudulent misdemeanours by agents, trustees, bankers,

[1] 51 & 52 Vict. c. 41, s. 83.
[2] 45 & 46 Vict. c. 50, s. 164.
[3] It is said that the Court of Quarter Sessions for the Soke of Peterborough is an exception.
[4] 5 & 6 Vict. c. 38, s. 1.
[5] 59 & 60 Vict. c. 57, s. 1.
[6] 9 Geo. IV. c. 69, s. 9.

factors, &c.;[1] personation of holders of stock;[2] offences against women and young girls punishable by the Criminal Law Amendment Act, 1885;[3] bribery of agents or servants under the Prevention of Corruption Act, 1906;[4] offences under the Punishment of Incest Act, 1908.[5]

All indictments are tried by a jury at quarter sessions. But, as we have seen,[6] the Court also deals with appeals from the decision of Courts of petty sessions. The justices or recorder hear such appeals without a jury and decide all questions arising thereon both of law and fact. Every such appeal is a re-hearing; witnesses are called before the Court, which can hear fresh evidence not presented to the Court below.[7] The Court of quarter sessions also hears appeals as to rating questions and affiliation orders, and appoints visiting justices in lunacy. It also directs the enrolment of orders, for the diversion or closing of highways, made on the certificate of justices who have viewed the way.[8] In counties it further confirms new licences, and can act as the compensation authority under the Licensing Act, 1904.[9] But the bulk of the administrative business of the Court of quarter sessions for a county has been transferred to the county council.[10]

The King's Bench Division has power to review and quash any conviction, order, or other proceeding of a Court of quarter sessions, which is brought before it by a writ of *certiorari*.

### 3. *The Assizes.*

We have already mentioned how members of the King's Court were sent by Henry II. on circuit throughout the country to try the most serious crimes in the King's Court. From this

[1] 24 & 25 Vict. c. 96, s. 87.
[2] 37 & 38 Vict. c. 36, s. 3.
[3] 48 & 49 Vict. c. 69, s. 17.
[4] 6 Edw. VII. c. 34, s. 2 (5).
[5] 8 Edw. VII. c. 45, s. 4 (2).
[6] See *ante*, pp. 980, 981.
[7] On the hearing of such an appeal, the Court can, if it thinks fit, state a case for the opinion of the King's Bench Division. As to any indictable offence, an appeal from a Court of Quarter Sessions lies only to the Court of Criminal Appeal.
[8] 5 & 6 Will. IV. c, 50, ss. 85—91.
[9] 4 Edw. VII., c. 23, s. 4.
[10] 51 & 52 Vict. c. 41, s. 3.

practice we have derived the modern assizes. England and Wales are divided into eight circuits, over each of which the judges of the High Court travel, holding a Court at the capital of each county and other assize towns. These circuits are:—

(1) Northern (Westmoreland, Cumberland and Lancashire).
(2) North-Eastern (Northumberland, Durham and Yorkshire).
(3) Midland (Lincoln, Derby, Nottingham, Warwick, Leicester, Northampton, Rutland, Buckingham and Bedford).
(4) South-Eastern (Norfolk, Suffolk, Huntingdon, Cambridge, Hertford, Essex, Kent, Surrey and Sussex).
(5) Oxford (Berkshire, Oxford, Worcester, Stafford, Salop, Hereford, Monmouth and Gloucester).
(6) Western (Hants, Wilts, Dorset, Devon, Somerset and Cornwall).
(7) North Wales and Chester (Montgomery, Merioneth, Carnarvon, Angelsey, Denbigh, Flint and Chester).
(8) South Wales (Pembroke, Cardigan, Carmarthen, Brecknock, Radnor and Glamorgan).

The King has power by Order in Council to appoint places at which assizes are to be held and to alter the arrangements of the existing circuits.[1] Various orders have been made with the following result. At least one judge of the High Court goes round each circuit three times a year, viz., in the winter, summer, and autumn. Two judges attend at each of the larger towns twice a year. At Liverpool, Manchester and Leeds four assizes are held in each year, two of which are attended by two judges, two by one. As a rule, only those barristers who are members of the particular circuit appear before the judge of assize.

The judges of assize sit under three commissions, viz., of oyer and terminer, gaol delivery, and assize. The first two commissions empower them to try all persons against whom a bill of indictment has been found by a grand jury of the

[1] 38 & 39 Vict. c. 77, s. 23. See also 39 & 40 Vict. c. 57; 40 & 41 Vict. c. 46; and 42 Vict. c. 1.

county of that assize, and also all persons brought before them charged under either a criminal information or a coroner's inquisition. The third commission—that of assize—empowers them, *inter alia*, to try civil actions. King's counsel on the circuit are also included in these commissions. All judges of the Supreme Court of Judicature are specially named in the commission of the peace for every county of England and Wales, and therefore have all powers of a justice of the peace.

### 4. *The Central Criminal Court.*

This Court was created in 1834 by the Central Criminal Court Act.[1] It is at once both the Court of assize and the Court of quarter sessions for the City of London and its liberties, and the Court of assize for the counties of London and Middlesex, and for certain specified parts of the counties of Essex, Kent and Surrey. The Central Criminal Court can try all offences committed on the high seas or within the jurisdiction of the Admiralty,[2] and also indictments for offences committed beyond the jurisdiction of the Court which have been sent by the King's Bench Division to be tried there under a writ of *certiorari*.[3]

The Central Criminal Court must sit at least twelve times a year at dates fixed by four judges of the High Court. The judges include the Lord Chancellor, the judges of the High Court, the Lord Mayor, Aldermen, Recorder and Common Serjeant of the City of London, and two commissioners. The Recorder and Common Serjeant usually sit on the first two days of each session; one or two judges of the High Court generally attend on the third day of the sittings to hear the more serious cases; but all the judges of the Court have equal rank and jurisdiction.[4]

[1] 4 & 5 Will. IV. c. 36.
[2] *Ib.*, s. 22. See also 7 & 8 Vict. c. 2. For the jurisdiction of the Admiralty, see *post*, p. 1009.
[3] Palmer's Act, 1856 (19 & 20 Vict. c. 16), ss. 1, 3.
[4] *R.* v. *Justices of C. C. C.* (1883), 11 Q. B. D. 479.

### 5. *The King's Bench Division of the High Court.*

The former Court of King's Bench was styled by Blackstone "the sovereign ordinary Court of justice in causes criminal,"[1] and the present King's Bench Division retains some portion of the splendour of its venerable predecessor. It exercises its jurisdiction in three distinct capacities:—

(i.) As a Court of first instance. The Court of King's Bench from the earliest times acted as the assize court for the ancient county of Middlesex;[2] it could try on indictment any treason, felony or misdemeanour committed therein, And in spite of the creation of the Central Criminal Court, the King's Bench Division has the same power, though it rarely exercises it. The procedure is the same as at the ordinary provincial assizes, except that in any case of misdemeanour either party can obtain a trial by special jury.[3] The trial will be held before one judge unless on motion an order has been made by the Court that the trial shall be at bar, *i.e.*, by three judges.[4]

Again, the King's Bench Division can try any misdemeanour in whatever part of England committed, for which a criminal information has been filed by some officer of the Crown.[5] It can also try any crime committed out of England by governors of colonies or other public officials,[6] or by officials of the Crown in India.[7]

(ii.) Secondly, into this Court indictments from all inferior Courts may be removed by writ of *certiorari* and tried there either at bar or *nisi prius* (*i.e.*, either by three judges or only one) by a jury of the county in which the crime was committed. This can only be done on one of the following grounds:—

(a) that a fair and impartial trial cannot be had in the Court below owing to local partiality or prejudice; or

[1] 4 Bla. Com. 320.
[2] Hence the King's Bench Division has now jurisdiction both over the modern county of Middlesex, and the greater part of the new county of London.
[3] But not for treason or felony: 6 Geo. IV. c. 50, s. 30.
[4] Crown Office Rules, 1906, rr. 150—155; Statutory Rules and Orders, 1906, p. 627.
[5] See *post*, pp. 1057, 1058.
[6] 11 Will. III. c. 12; 42 Geo. III. c. 85.
[7] 10 Geo. III. c. 47, s. 4; 13 Geo. III. c. 63, s. 39; 21 Geo. III. c. 70, s. 7.

(b) that some question of law of more than usual difficulty or importance is likely to arise upon the trial; or

(c) that a special jury or a view of certain premises is necessary to a satisfactory trial and cannot be obtained in the Court below.[1]

(iii.) The King's Bench Division has also appellate jurisdiction. The judges of the old Court of King's Bench were "the supreme coroners of the kingdom," and as such had a general superintending over all inferior Courts which had any jurisdiction in criminal matters. They could order that the proceedings in any such inferior Court should be brought before them and quashed, if they were found to be irregular, whether they related to charges of high treason or of the smallest misdemeanour which affected the public welfare. This wide power has now devolved on the King's Bench Division of the High Court of Justice,[2] and is usually exercised by a Divisional Court consisting of two or three judges. It is exercised in two ways:—

(a) It can review and, if necessary, quash any order, determination or other proceeding by a Court of quarter sessions or of summary jurisdiction, which is brought before it by a writ of *certiorari*.

(b) Any Court of summary jurisdiction may, if it thinks fit, state a case setting forth the facts for the opinion of the King's Bench Division on any point of law arising in the proceedings before it, and the King's Bench Division may, if they deem it right, order justices of petty sessions to state such a case. A Court of quarter sessions may[3] state a case for the consideration of the King's Bench Division, but only on a point of law arising in regard to some matter that has come before it on appeal from petty sessions. On the argument of any such case the King's Bench Division has power to quash the conviction or other proceeding, and to make any

[1] Crown Office Rules, 1906, r. 13.

[2] For the most authoritative decisions as to the true nature and jurisdiction of the King's Bench Division, see *The Overseers of Walsall* v. *L. & N. W. Ry. Co.* (1878), 4 App. Cas. 30; *R.* v. *Justices of Galway*, [1906] 2 Ir. R. at p. 448.

[3] There is apparently no power to compel them to do so.

such order which ought to have been made by the Court below; or to remit the case to the Court below either for the statement of additional facts, or for re-hearing and determination, subject to the opinion expressed by the King's Bench Division.[1]

### 6. *The Court of Criminal Appeal.*

This court has jurisdiction over all criminal cases tried at quarter sessions, the assizes, the Central Criminal Court, or in the King's Bench Division, whether on an indictment or a criminal information or a coroner's inquisition.[2] It consists of the Lord Chief Justice of England and the other judges of the King's Bench Division.[3] The Court is properly constituted if there are present not less than three judges; the number must be uneven, and the decision of the majority prevails. It sits in London unless otherwise directed.[4] An appeal lies from this Court to the House of Lords, but only in cases where the Attorney-General has certified that the decision involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought.[5]

To this Court the convicted prisoner has an unfettered right of appeal on any question of law.[6] Again, from the verdict of the jury on any question of fact, or from the decision of the Court on any question of mixed law or fact, the prisoner can appeal, provided he obtain either the leave of the Court of Criminal Appeal or a certificate from the judge who tried the case that it is a fit case for appeal,[7] *e.g.*, that the verdict is unreasonable, or that it cannot be supported on the evidence laid before the Court, or that on any ground there has been a miscarriage of justice.[8] Lastly, the prisoner can appeal against the sentence passed upon him, but only if he has

[1] Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 2 (2).
[2] Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), ss. 3, 20.
[3] 7 Edw. VII. c. 23, s. 1, as amended by 8 Edw. VII. c. 46, s. 1.
[4] 7 Edw. VII. c. 23, s. 1 (2).
[5] *Ib.*, s. 1 (6).
[6] *Ib.*, s. 3 (a).
[7] *Ib.*, s. 3.
[8] *Ib.*, s. 4.

obtained the leave of the Court of Criminal Appeal.[1] But in doing so he runs a certain risk, for on such an appeal the Court may, if it thinks fit, quash the sentence appealed against and inflict a more serious one.[2]

The Court of Criminal Appeal can quash a conviction on any of the grounds on which a verdict can be set aside in civil cases.[3] It may enter a verdict of acquittal and thus prevent the injustice of allowing a person, who is now adjudged to be innocent, to remain recorded as a criminal. In a proper case it will hear fresh evidence. But the Court cannot grant a new trial in any criminal case. It apparently can do so in the case of an "indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river, in whatever Court the indictment is tried;" for such a proceeding, though criminal, is really civil in its character.[4]

### 7 *and* 8. *The House of Lords and the Court of the Lord High Steward.*

The House of Lords exercises criminal jurisdiction both as a Court of first instance and as a Court of appeal.

(i.) As a Court of first instance the House of Lords can try anyone impeached by the House of Commons for any high crime or misdemeanour; the latest instance is the impeachment of Lord Melville in 1806.[5] As a Court of first instance it can also try temporal peers and peeresses accused of high treason, felony, or misprision. In such cases the accused cannot waive his privilege to be so tried.[6] The preliminary proceedings take place in one of the ordinary Courts and are the same as on any other indictment, but after the grand jury have found a true bill the indictment is removed to the House of Lords (or into the Court of the

[1] 7 Edw. VII. c. 23, s. 3.
[2] *Ib.*, s. 4.
[3] *Ib.*, s 4 (2).
[4] *Ib.*, s. 20 (3). The King's Bench Division formerly had power to grant a new trial in the case of a misdemeanour tried before it; but this power was rarely exercised and is now abolished by this section.
[5] 29 St. Tr. 549.
[6] Co. 3 Inst. 29; Kelyng's Rep. 56.

Lord High Steward) by writ of *certiorari*. For the purposes of the trial the House is presided over by a peer as Lord High Steward appointed by the King's Commission, or in the absence of such appointment by the Lord Chancellor. His Majesty's judges may be summoned to give their opinion on any questions of law that may arise.[1] But all the members of the House are entitled to be present, and when present are equally judges of law and of fact. Though a Lord High Steward may be presiding, he has merely the right to regulate the procedure, and is a judge of law to no greater extent than any other peer. The bishops have a right to be present, but by the common law they may not vote in capital cases, and so withdraw before judgment is given.

If the House of Lords is not sitting, the accused will be tried in the Court of the Lord High Steward. In such a case the Lord High Steward is not merely the president of the Court, giving his vote with the rest: he is judge of matters of law. All peers who have a right to sit and vote in Parliament must be summoned to attend.[2] They are the sole judges of fact, and the majority, which must consist of twelve at least, decides the guilt or innocence of the accused.

(ii.) The House of Lords also sits as a Court of final appeal. Its jurisdiction in this respect is practically confined to appeals in civil cases. Before 1908 an appeal would only lie to this House in a criminal case on a point of law apparent on the face of the record. But now an appeal lies to it from a decision of the Court of Criminal Appeal, should the Attorney-General certify "that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought."[3]

[1] See *R.* v. *Earl Russell*, [1901] A. C. 446, in which case "the Earl of Halsbury, L. C., presided as Lord High Steward. There were also present about 160 peers, including all the law lords, who generally hear appeals, and the following judges:—Sir Francis Jeune, and Mathew, Wills, Wright, Lawrance, Kennedy, Darling, Bigham, Cozens-Hardy, Farwell, and Buckley, JJ."

[2] 7 & 8 Will. III. c. 3, s. 11.

[3] Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), s. 1 (6)

## Chapter IV.

### Superior Civil Courts.

Our chief Civil Court of first instance is—

1. The High Court of Justice.

From this Court an appeal lies to

2. The Court of Appeal,

and a further appeal to

3. The House of Lords.

Appeals from the Channel Islands, the Isle of Man, India, and the Colonies lie to

4. The Judicial Committee of the Privy Council.

5. There are other Courts vested with local or special jurisdiction which are yet superior Courts, such as:

(i.) The Chancery Court of the County Palatine of Lancaster.

(ii.) The Chancery Court of the County Palatine of Durham.

(iii.) The Court of Railway and Canal Commission.

An immense quantity of minor civil business is transacted in the County Courts and the Borough Courts. These local courts, however, are inferior Courts of record, and will be discussed in the next chapter. Justices of the Peace have also, as we have seen,[1] jurisdiction over certain civil or *quasi*-civil matters.

### 1. The High Court of Justice.

The Supreme Court of Judicature in its entirety has no judicial function; it performs, however, important duties in regard to the making of orders and rules for regulating pro-

[1] See *ante*, p. 978.

cedure. It has a central office, which was created in 1879.[1] It consists of two parts:—

The High Court of Justice, which exercises original jurisdiction, and also possesses appellate jurisdiction from some inferior Courts, and

His Majesty's Court of Appeal, which exercises appellate jurisdiction with such original jurisdiction only as may be incident to the determination of an appeal.

There is no limit to the amount which a plaintiff can recover in an action properly brought in the High Court of Justice. It has jurisdiction over all persons who are within England and Wales, whether they be British subjects or not.[2] It has also a general jurisdiction over all injuries done by one Englishman to another in any corner of the world, whether in an English colony or in a foreign country,[3] and also over injuries done by one alien to another abroad, provided such injuries be actionable by the law of England and also wrongful by the law of the country where they were committed.[4] But the Court has of its own accord restricted these wide powers to cases in which the defendant is within jurisdiction at the time the writ is issued,[5] so that it can be served upon him here. If the defendant is out of jurisdiction, no writ can be issued except by leave, and such leave will only be granted in the cases specified in Order XI.[6]

Leave will be readily granted if the whole subject-matter of the action be land situate within jurisdiction, or the construction, rectification, avoidance, or enforcement of any deed, will, contract, obligation or liability affecting lands or tenements within jurisdiction.[7] Such matters by international law belong to the *forum rei sitæ*. For the same reason the High Court has no jurisdiction to entertain an action to recover damages for trespass to land situate abroad.[8]

Again, leave can be obtained to issue a writ against anyone, who is not

[1] Supreme Court of Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78), ss. 4—14.
[2] There is one exception; see *post*, pp. 1029, 1030.
[3] *Scott* v. *Lord Seymour* (1862), 1 H. & C. 219.
[4] *Machado* v. *Fontes*, [1897] 2 Q. B. 231; *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176.
[5] *Watkins* v. *North American, &c., Co.* (1904), 20 Times L. R. 534.
[6] *In re Eager*, *Eager* v. *Johnstone* (1882), 22 Ch. D. 86.
[7] Order XI., r. 1 (*a*) and (*b*).
[8] *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A. C. 602.

domiciled or ordinarily resident in either Scotland or Ireland, for any breach within jurisdiction of a contract which ought to be performed within jurisdiction.[1] It does not matter where the contract was made. And it will be sufficient if a part of the contract has been broken, provided that part had to be performed within jurisdiction.[2] But there is much greater difficulty in obtaining leave in an action of tort. Such actions are not expressly mentioned in the Order.

If, however, the proposed defendant, though temporarily abroad, is domiciled or ordinarily resident within the jurisdiction, he can be sued here both in contract and in tort.[3] A foreign company may reside within jurisdiction;[4] but a man who carries on business within jurisdiction, whether in his own name or under any other style or firm, cannot be sued here, if he resides abroad.[5] And there can be no substituted service of a writ in an action in which there cannot in law be personal service.[6]

Leave will also be given to serve a writ out of jurisdiction, whenever "the action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to the property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, and which ought to be executed according to the law of England."[7] And where the writ has already been duly served on a defendant within jurisdiction, leave will be given in a proper case[8] to serve another defendant who is outside jurisdiction, provided he be a necessary and proper party to the action.

The procedure in the High Court is mainly regulated by "Rules of the Supreme Court," which are divided according to their subject-matter into seventy-eight "Orders." They are made by judges under powers conferred on them by the Judicature Acts, and have all the force and effect of a statute. These rules, however, do not apply to the procedure or practice in any proceedings

(*a*) in criminal matters;

(*b*) on the Crown side of the King's Bench Division;

[1] Order XI., r. 1 (*e*); *Charles Duval & Co.* v. *Gans*, [1904] 2 K. B. 685.

[2] *Rein* v. *Stein*, [1892] 1 Q. B. 753, 757; *Mutzenbecker* v. *Española*, [1906] 1 K. B. 254.

[3] Order XI., r. 1 (*c*).

[4] "*La Bourgogne*," [1899] A. C. 431. The fact that a foreign company limited has a branch office in this country, will not enable a plaintiff to serve a writ at the branch office without leave under Order XI.: *Jones* v. *Scottish Accident Insurance Co., Ltd.* (1886), 17 Q. B. D. 421; *O'Connor* v. *Star Newspaper Co., Ltd.* (1891), 30 L. R. Ir. 1.

[5] *De Bernales* v. *New York Herald*, [1893] 2 Q. B. 97, n.; *MacIver* v. *Burns*, [1895] 2 Ch. 630.

[6] *Field* v. *Bennett* (1886), 56 L. J. Q. B. 89; *Jay* v. *Budd*, [1898] 1 Q. B. 12.

[7] Order XI., r. 1 (*d*).

[8] *Ib.*, r. 1 (*g*).

(*c*) on the Revenue side of the King's Bench Division; or
(*d*) in Divorce or other matrimonial causes.[1]

As we have already seen, the High Court of Justice is now divided into three divisions, viz.:—

(i.) The King's Bench Division.
(ii.) The Chancery Division.
(iii.) The Probate, Divorce, and Admiralty Division.

We will deal first with—

### (i.) *The King's Bench Division.*

The Lord Chief Justice of England is the President of this Division. He is nominated for that office by the Prime Minister. There are also seventeen puisne judges, who are appointed by letters patent from the Crown on the recommendation of the Lord Chancellor. They must be at the date of their appointment barristers of not less than ten years' standing.[2] The greater part of their time is occupied in trying civil causes with or without a jury, and either at the Royal Courts of Justice in London or at the Assizes all over England and Wales. For this purpose each judge sits separately. But two or more judges frequently sit together and so form a Divisional Court to hear appeals from county courts and magistrates, and to prohibit inferior tribunals from exceeding their jurisdiction. A judge also sits every day at Judges' Chambers in the Royal Courts to hear appeals from Masters and to deal with other interlocutory matters.

The business of the High Court of Justice is grouped under several heads. Separate lists are published of special jury causes, common jury causes, cases for trial by judge alone, commercial cases, and short causes sent for trial under Order XIV., respectively. When trying any of these actions, the judge is assisted by an associate who swears the jury and the witnesses, and reads aloud documents which are admitted in evidence after seeing that they are properly stamped.

[1] Order LXVIII., r. 1.
[1] 36 & 37 Vict. c. 66, s. 8.

*Commercial Causes.*

Provision has been made for the prompt dispatch of commercial business in the King's Bench Division. At the commencement of each sittings one judge is appointed specially to hear commercial causes in London, and another in Liverpool. A separate list is kept for the entry of such causes for trial. If either party desires to have the action entered in this list, he applies to the special judge, who will order the action to be transferred to the Commercial List, if he deems it a commercial cause. An appeal will lie from his decision to the Court of Appeal on the ground that the action is not a commercial cause.[1] Commercial causes include causes arising out of the ordinary transactions of merchants and traders—amongst others, those relating to the construction of mercantile documents, exports or imports of merchandise, affreightment, insurance, banking, and mercantile agency and mercantile usages.[2] As soon as a cause is entered in the Commercial List, any application with respect to it is generally made to the judge in charge of such list, and not to a Master. The judge may, at any stage of the proceedings, give judgment on any point of law raised on the pleadings; he may also at any time after appearance and without pleadings make such order as he thinks fit for the speedy determination of the questions really in controversy between the parties.

When the so-called "Commercial Court" was established, it was at first supposed that this Court would be allowed greater laxity in construing the ordinary rules of evidence; but in *Baerlein* v. *Chartered Mercantile Bank*,[3] Lindley, L. J., said: "The Commercial Court has no more power to dispense with strict evidence, or to depart from the administration of the law in the ordinary way, than any other judge or Court. The power to dispense with strict evidence depends entirely on the Judicature Act of 1894." There is strictly no such thing as the Commercial Court. "There is no Act of Parliament establishing such a Court; it is a mere piece of convenience in the arrangement of business."[3]

An order for the transfer of the action to the commercial list will be made, where "the Court is satisfied that the judge's having peculiar

[1] *Sea Insurance Co., Ltd.* v. *Carr*, [1901] 1 K. B. 7.
[2] See Annual Practice, 1910, Vol. II., at p. 781.
[3] [1895] 2 Ch. at p. 491.

knowledge of commercial matters and habitual practice in dealing with commercial documents and correspondence between commercial men, will greatly facilitate the trial of that particular case," [1] but not merely on the ground that the case relates to a bill of exchange or to a security for goods or to a bill of lading or stoppage *in transitu*. It will be good ground for applying for an order to transfer the action to the Commercial Court that the case "is likely to be tried far better, far more quickly, far more economically, and far more advantageously in every sense if it comes before a judge who has special skill and knowledge as to transactions of this nature, than if it keeps its place in one of the general lists," or that "the case requires the consideration of an enormous amount of mercantile correspondence and great familiarity with commercial business." [1] "Every cause must be regarded, when an application of this kind is made, in respect of its particular features and its particular elements, and in each case it is for the Court to determine whether or not in their opinion it would be more effectively, more quickly, and at less expense tried in the Commercial Court than elsewhere." [2]

### *The Masters.*

The judges receive valuable assistance from nine Masters. These officers are appointed by the Lord Chancellor, the Lord Chief Justice and the Master of the Rolls in rotation.[3] They must have been practising barristers or special pleaders, or solicitors of five years' standing. Their duties are very varied. The central office of the Supreme Court is under their control and superintendence. They have power to transact all such interlocutory business, and exercise such authority and jurisdiction as may be transacted or exercised by a judge at chambers, except in the following matters:—

"(a) All matters relating to criminal proceedings or to the liberty of the subject;

(b) Granting leave for service out of the jurisdiction of a writ or notice of a writ of summons;

(c) Appeals from district registrars;

(d) Prohibitions;

(e) Injunctions and other orders under sub-section 8 of section 25 of the principal Act, other than orders for

[1] *Per* Lindley, L. J., in *Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. at p. 493.

[2] *Per* Lopes, L. J., *ib.*, at p. 495.

[3] Supreme Court of Judicature (Officers) Act, 1879 (42 & 43 Vict. c. 78), s. 9 (1), as amended by 47 & 48 Vict. c. 61, s. 19.

the appointment of receivers by way of equitable execution and injunctions so far, and so far only, as the same are ancillary or incidental to equitable execution;

(f) Reviewing taxation of costs;

(g) Acknowledgments of married women or applications to dispense with the concurrence of a husband in a disposition by a married woman."[1]

They also tax solicitors' bills of costs, examine affidavits, and investigate matters specially referred to them by any Court or a judge.

An application at chambers, whether to a judge or to a master, is usually made by summons; in urgent cases, however, it may be made *ex parte*, that is, without any notice to the other side. Any person affected by an order of a master may appeal therefrom to the judge at chambers. Such appeal is by endorsement made upon the summons by the master, or by notice in writing, given within four days after the decision complained of, or such further time as may be allowed. An appeal from the master's decision will be no stay of proceedings unless so ordered by a judge or master. In all matters of practice and procedure there is a further appeal to the Court of Appeal, but as a rule the leave of the judge or of the Court of Appeal must first be obtained.

### *The District Registrars.*

There are in most of our larger provincial towns branch offices of the High Court of Justice called district registries; their districts are defined by various Orders in Council. A district registrar has in all actions proceeding in his district registry the same powers as a Master and does substantially the same work. Any plaintiff, wherever resident, may (except in a probate action) issue his writ either out of a district registry or out of the central office in London at his option.[2] If he adopts the former course all proceedings will, unless otherwise ordered, be taken in the district registry down to and including the entry of final judgment, and also the subsequent proceedings for enforcing the judgment.[3]

[1] Order LIV., r. 12.
[2] Order V., r. 1.
[3] Order XXXV., rr. 1, 5.

Where the writ of summons is issued out of a district registry and the plaintiff is entitled to an interlocutory judgment, this must be entered in the district registry, and so will the final judgment when damages have been assessed.[1]

On the other hand, when an action is proceeding in London, either party can, in a proper case, obtain an order transferring it to a district registry.[2] An appeal from the decision of a district registrar lies to the judge in chambers in London.

### *The Official Referees.*

The Judicature Act created a new class of permanent officials called Official Referees.[3] Their duty is to try such questions and actions as may be referred to them under the provisions of that or any subsequent Act or of any rule of Court, and also to act as arbitrators in cases referred to them as such under the Arbitration Act, 1889.[4] There are at present three official referees. They are officers of the Supreme Court. Their offices are at the Royal Courts of Justice, London; but they perform their duties either in London or in the country, as they may from time to time be directed or may deem most convenient.

The work of an official referee may be roughly grouped under four heads:—

1. References for trial under section 14 of the Arbitration Act, 1889.[4]
2. References for inquiry and report under section 13 of that Act.
3. The assessment of damages under Order XXXVI., r. 57A.
4. References to him as an arbitrator by consent of the parties or under an order of the High Court under section 3 of the Arbitration Act, 1889.

An appeal lies against the order of the Court or a judge under either section 13 or 14 of the Arbitration Act, 1889, and it may be reversed if the Court of Appeal thinks that the discretionary power was wrongly exercised.[5] If the parties agree on a particular referee, they may have his name inserted in the order of reference, otherwise the business is distributed to the official referees in rotation.[6] But the Lord Chancellor and the Lord

[1] Order XXXV., r. 2.
[2] Order XXXV., r. 17.
[3] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 83.
[4] 52 & 53 Vict. c. 49.
[5] *Case* v. *Willis* (1892), 8 Times L. R. 610.
[6] Order XXXVI., r. 45.

Chief Justice of England have each power to order the transfer of any causes and matters from one official referee to another, if the state of pending business renders such a transfer expedient.[1]

1. *References for Trial.*—In any cause or matter (other than a criminal proceeding by the Crown) the Court or a judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an official referee—

(a) if all the parties interested who are not under disability consent; or,

(b) if the cause or matter requires any prolonged examination of documents,[2] or any scientific or local investigation,[3] which cannot in the opinion of the Court or a judge conveniently be made before a jury or conducted by the Court through its other ordinary officers; or,

(c) if the question in dispute consists wholly or in part of matters of account.[4]

If any substantial portion of the matter in dispute in an action is a question of account which cannot be conveniently tried in the ordinary way, the Court or judge has power to refer the whole action to an official referee.[5]

An order under section 14 of the Arbitration Act, 1889, can only be made in a pending proceeding, and should be strictly confined to questions arising in that proceeding unless the parties by consent include other matters in the reference, in which case the award will owe its validity to the consent of the parties, and not to any statutory authority.[6]

An official referee, to whom any action has been referred for trial under section 14 of the Arbitration Act, 1889, has full power to deal with any interlocutory application affecting the conduct of such reference, such as an application for amendment of pleading, or particulars, or discovery, or a commission to examine a witness abroad; but an appeal lies from his decision on such matters to the judge at chambers.[7] The hearing before him is conducted in the same manner as a trial before a judge without a jury; but he has no power of committal or attachment.[8] He may have an inspection or view, if he deems it expedient, for the better disposal of the controversy before him.[9] He may at any stage of the proceedings state a special case for the opinion of the Court on any question of law arising in the reference,[10] but this is now very seldom done. He usually delivers in

[1] Order XXXVI., r. 47 B.
[2] *Ormerod* v. *Todmorden Mill Co.* (1882), 8 Q. B. D. 664.
[3] *Hamilton* v. *Merchants' Marine Insurance Co.* (1889), 58 L. J. Q. B. 544.
[4] 52 & 53 Vict. c. 49, s. 14.
[5] *Ward* v. *Pilley* (1880), 5 Q. B. D. 427; *Hurlbatt* v. *Barnett & Co.*, [1893] 1 Q. B. 77.
[6] *Darlington Waggon Co.* v. *Harding, &c., Co.*, [1891] 1 Q. B. 245.
[7] *Hayward* v. *Mutual Reserve Association*, [1891] 2 Q. B. 236; *Macalpine & Co.* v. *Calder & Co.*, [1893] 1 Q. B. 545.
[8] Order XXXVI., rr. 49, 51, 52 A, 55 C.
[9] *Ib.*, r. 48.
[10] *Ib.*, rr. 52, 52 A, 52 C; 52 & 53 Vict. c. 49, s. 19.

open Court a judgment stating his findings of fact and decision on the law. A written order or certificate is then drawn up by which he directs how judgment shall be entered.

Either party may move to set aside the judgment directed to be entered by an official referee, wholly or in part, on any ground on which he might move to set aside the judgment entered by the order of a judge.[1] If the action be in the King's Bench Division, any motion to set aside the official referee's certificate, and also apparently any motion for a new trial,[2] must still be made to a Divisional Court;[3] and from the decision of the Divisional Court an appeal lies to the Court of Appeal, without leave.[4] But if the action be in any other division, the application should be made to the judge to whom the action was assigned.[5]

On the hearing of such a motion, the Court has power, *inter alia*[6]—

(a) to set aside the judgment or any of the findings of the official referee;

(b) to remit the cause or matter, or any part thereof, to the same or any other referee for reconsideration with such directions as they may think fit (*e.g.*, where fresh material evidence has been discovered since the trial).[7]

(c) to direct judgment to be entered for either party, or make such other order therein as may be just.[8]

2. *References for Inquiry or Report.*—Subject to rules of Court, and to any right to have particular cases tried by a jury, a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) to any official referee for inquiry or report.

The official referee in this case reports his finding to the judge who referred the question to him; and that judge may adopt the report and direct judgment to be entered accordingly, unless either party moves to have the report varied or sent back to the same or some other referee for further inquiry.[9]

This power is frequently exercised in cases where a difficult account has to be taken. At any stage of the proceedings in any cause or matter, the Court or a judge may direct any necessary accounts to be taken, notwithstanding that there may be some further relief sought for, or some special issue still to be tried.[10] And such an account may be sent to be taken by an official referee.[11] The Court or a judge may, in the order, give special

[1] Order XL., r. 6.
[2] *Forrest* v. *Todd* (1897), 76 L. T. 500.
[3] Order LIX., r. 3; *Glasbrook* v. *Owen* (1890), 7 Times L. R. 62; *Gower* v. *Tobitt* (1891), 39 W. R. 193; *Wynne-Finch* v. *Chaytor*, [1903] 2 Ch. 475.
[4] *Munday* v. *Norton*, [1892] 1 Q. B. 403.
[5] *Wynne-Finch* v. *Chaytor*, *supra*, overruling *Serle* v. *Fardell* (1890), 44 Ch. D. 299.
[6] Under Order LVIII., r. 4, and Order LIX., r. 3.
[7] And see ss. 10, 16, 17 of the Arbitration Act, 1889.
[8] *Clark* v. *Sonnenschein* (1890), 25 Q. B. D. 464; *Joyner* v. *Weeks*, [1891] 2 Q. B. 31.
[9] Order XXXVI., rr. 54, 55; 52 & 53 Vict. c. 49, ss. 10, 16, 17.
[10] Order XXXIII., r. 2.
[11] *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196, 213.

directions as to the mode in which the account is to be taken or vouched; it may, for instance, direct that the books of account, in which the accounts in question have been kept, shall be taken as *primâ facie* evidence of the truth of the matters contained in them.[1] But, in the absence of any such special direction, the official referee is allowed a wide discretion as to his mode of procedure. An official referee, when acting under this section, has no power to make any order as to costs.

3. *Assessment of Damages.*—When an interlocutory judgment has been signed in an action in the King's Bench Division and the amount of damages sought to be recovered is substantially a matter of calculation, the judge may direct that the amount for which final judgment is to be entered shall be ascertained by an official referee. The attendance of witnesses and the production of documents before such official referee may be compelled by *subpœna*. He will indorse the amount found by him upon the order referring the amount of damages to him, and deliver the order, with such indorsement, to the person entitled to the damages. All subsequent proceedings as to taxation of costs, entering judgment, and otherwise, will be taken precisely as though the amount so found had been assessed by a jury upon a writ of inquiry.[2]

4. *Submission to an Official Referee.*—The parties to any dispute may without commencing any litigation agree in writing to submit all matters specified in such writing to the decision of an official referee; and such official referee will then, subject to any order of the Court or a judge as to transfer or otherwise, hear and determine the matters agreed to be referred to him, and make and publish his award thereon.[3] An official referee has in such matters all the powers of an arbitrator under the Arbitration Act, 1889.

### *Jurisdiction in Bankruptcy of the King's Bench Division.*

The London Court of Bankruptcy was not included in the list of Courts, whose jurisdiction was vested in the High Court by the Judicature Act, 1873. But by section 93 of the Bankruptcy Act, 1883,[4] this Court was united and consolidated with and now forms part of the Supreme Court of Judicature, and its jurisdiction is transferred to the High

[1] Order XXXIII., r. 3.
[2] Order XXXVI., rr. 57 and 57 A. As to enforcing payment of the Court fees in connection with proceedings before an official referee, see Order XXXVI., r. 55 D.
[3] 52 & 53 Vict. c. 49, s. 3.
[4] 46 & 47 Vict. c. 52.

Court of Justice. By section 94 of the same Act and orders made thereunder by the Lord Chancellor, all matters, which would previously have been within the exclusive jurisdiction of the London Court of Bankruptcy, are assigned to the King's Bench Division, and all officers and clerks of the former Court were attached to the High Court.

Every county court also has now jurisdiction in bankruptcy save a few, which have been specially excepted by orders made by the Lord Chancellor under section 92 of the Bankruptcy Act, 1883. In order to determine in which Court a petitioning creditor must file a petition against a particular debtor, it is necessary to ascertain in what district that debtor spent the greater portion of the six months which immediately preceded the presentation of the petition. If during those six months he resided in the metropolis for a longer period than he did in the district of any provincial county court, the petition must be filed in the High Court of Justice. Proceedings must also be taken in the High Court against any debtor, who is not resident in England or whose address cannot be found.[1] The King's Bench Division also hears appeals from the county court in bankruptcy matters.[2]

The jurisdiction of the High Court is exercised by one of the judges of the High Court appointed from time to time for the purpose by the Lord Chancellor and called the judge in bankruptcy.[3] There are also five registrars in bankruptcy appointed by the Lord Chancellor, who have power to hear bankruptcy petitions and to make receiving orders and adjudications thereon; to publicly examine debtors; to grant orders of discharge; to approve compositions and schemes of arrangement; and such other powers as are necessary to decide questions arising in the bankruptcy.[4]

The judge may review, rescind, or vary any order made by a registrar in the exercise of his bankruptcy jurisdiction,[5] and this power he frequently exercises in rescinding receiving orders and reconsidering refusals of discharge. An appeal

[1] S. 95; and see *post*, p. 1390.
[2] See Bankruptcy Appeals (County Courts) Act, 1884 (47 Vict. c. 9).
[3] 46 & 47 Vict. c. 52, s. 94 (2).
[4] S. 99 (1); Bankruptcy Rules, 1886, s. 7. One of the bankruptcy registrars acts as registrar in the winding up of companies, so that the actual number of the registrars who act in bankruptcy matters is four.
[5] *In re Tobias* (1891), 8 Morr. 30.

from the judge in bankruptcy, or from one of the registrars of the High Court in Bankruptcy lies to the Court of Appeal, and thence to the House of Lords—but only by leave of the Court of Appeal.

There is another important official attached to every Court which has jurisdiction in bankruptcy. He is appointed by the Board of Trade, and is called the "official receiver." His chief duty is to investigate the conduct of the debtor; he conducts the public examination of the debtor, and reports to the Court upon any previous transactions connected with his insolvency. In some cases it is necessary to prosecute the bankrupt for offences against the Debtors Act, 1869,[1] and in such a prosecution the official receiver takes a leading part. He also acts as receiver and manager of the debtor's estate until a trustee is appointed.

In discharging these duties an official receiver is under the supervision and control of the Board of Trade, which also audits his accounts and has power to disallow any items improperly charged therein.

A trustee is appointed by a resolution of the creditors passed at a meeting by a majority in value of those present; he may or may not be a creditor himself; his appointment must be sanctioned by the Board of Trade.[2] As soon as a trustee has been appointed, he becomes an officer of the Court, and all the property of the bankrupt, of whatever kind and wherever situated, subject to a few exceptions,[3] vests in him. His title to such property will thenceforward be recognised by every Court in the British dominions.[4] It is his duty to realise this property and distribute the proceeds amongst the creditors. The Board of Trade has a large power of control over trustees; it enforces the due performance of their official duties; and audits their accounts, and can disallow their remuneration.

### *Jurisdiction over Election Petitions.*

Formerly the House of Commons claimed as one of its privileges, and exercised, the right to determine questions of a disputed election for any county or borough. Such questions were at first referred to a Committee of Privileges and Elections, then to a Committee of the whole House, and after the year 1770 to a Select Committee. In 1868, jurisdiction over disputed elections to the House of Commons was transferred to the Court of Common Pleas at Westminster,[5] and such

[1] 32 & 33 Vict. c. 62, ss. 11, 12; see *ante*, pp. 369, 370.
[2] 46 & 47 Vict. c. 52, s. 21.
[3] See *post*, pp. 1393, 1394.
[4] 42 & 43 Vict. c. 52, ss. 21, 22, 58, 169; see *Ex parte James* (1874), L. R. 9 Ch. 614; *Ex parte Simmons* (1888), 16 Q. B. D. 308.
[5] 31 & 32 Vict. c. 125, s. 5; see also 46 & 47 Vict. c. 51.

matters are now heard and determined by two judges of the High Court of Justice. The result of such trial is intimated to the Speaker, who either confirms the election or issues a new writ.

### *The Divisional Courts.*

The judges of the King's Bench Division frequently sit as a Divisional Court. Such a Court consists of two judges, or of more than two if the Lord Chief Justice, with the concurrence of not less than two other judges, should think it expedient. When appeals in bankruptcy are set down for hearing, the judge in bankruptcy must be a member of the Court.[1] Any number of Divisional Courts may sit at the same time; each of them exercises all or any part of the jurisdiction of the High Court.[2]

We have already dealt with the jurisdiction, both original and appellate, of a Divisional Court of the King's Bench Division in criminal matters.[3] In civil matters its jurisdiction is almost entirely appellate, except in matters on "the Crown side" with which we shall deal presently.[4] Thus it deals, *inter alia*, with:—

Appeals from revising barristers;[5]

Appeals from county courts under section 120 of the County Courts Act, 1888,[6] and in bankruptcy;

Special cases stated by Courts of petty and quarter sessions in civil matters;

Cases stated by the Railway Commissioners under the Railway and Canal Traffic Act, 1873;[7]

Appeals from the Mayor's Court, London,[8] the Salford Hundred Court,[9] and the Vice-Chancellor's Court of the University of Oxford;[10]

[1] See Bankruptcy Appeals (County Courts) Act, 1884 (47 Vict. c. 9), s. 2.
[2] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 40.
[3] See *ante*, p. 988.
[4] See Order LIX., r. 1 (*a*).
[5] *Ib.*, r. 1 (*b*).
[6] 51 & 52 Vict. c. 43.
[7] 36 & 37 Vict. c. 48, s. 29.
[8] Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. 157), s. 45.
[9] Salford Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.), s. 89.
[10] 25 & 26 Vict. c. 26, and Order in Council of August 23, 1894.

And in a few cases, appeals from a judge of the High Court sitting in chambers.

In these matters the decision of a Divisional Court is final, unless leave to appeal is given by the Divisional Court or by the Court of Appeal.[1] In some cases, however, no such leave can be given, and the decision of the Divisional Court is therefore absolute.

*The Crown Side of the King's Bench Division.*

Proceedings on the Crown side of the King's Bench Division may be either civil or criminal. The criminal proceedings are by way either of an indictment,[2] or of a criminal information.[3] The chief civil proceedings are:—

(i.) *mandamus*;[4]
(ii.) *habeas corpus*;[5]
(iii.) *certiorari*;[6]
(iv.) prohibitions;[7]
(v.) informations in the nature of a *quo warranto*;[8]
(vi.) attachments for contempt of Court;[9]
(vii.) petitions of right.[10]

Certain of these proceedings, such as *habeas corpus*, *certiorari*, and prohibitions, might formerly have been brought in other Courts besides the King's Bench, *e.g.*, in the Court of Chancery; and these other Courts had jurisdiction to award costs in such matters, although the Court of King's Bench had not. Hence now, since the fusion of law and equity effected by the Judicature Act, if proceedings be brought in *habeas corpus*, *certiorari* or prohibition on the Crown side of the King's Bench Division, the Court has jurisdiction to award costs. But where the proceedings could only have been brought on the Crown side of the King's Bench before the Judicature Act, there is no general power to award costs.[11] The procedure in all such matters is now regulated by the Crown Office Rules of 1906. Order LII. of the Rules of the Supreme Court applies to proceedings on the Crown side of the King's Bench Division.

[1] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45.
[2] See *post*, pp. 1053—1056.
[3] See *post*, pp. 1057—1059.
[4] See *post*, pp. 1163—1166.
[5] See *post*, pp. 1161—1163.
[6] See *post*, pp. 1167—1170.
[7] See *post*, pp. 1166, 1167.
[8] See *post*, p. 1170.
[9] See *post*, pp. 1172, 1173.
[10] See *post*, pp. 1170—1172.
[11] *R.* v. *JJ. of London*, [1894] 1 Q. B. 453; *R.* v. *Jones*, [1894] 2 Q. B. 382; *R.* v. *Woodhouse*, [1906] 2 K. B. 501.

*The Revenue Side of the King's Bench Division.*

Revenue cases since 1901 are heard by a single judge, appeals from whom go direct to the Court of Appeal, and not to a Divisional Court. Order XIX. of the Rules of the Supreme Court as to pleading has no application to these proceedings; hence the defendant to an information on the Revenue side may still plead the general issue.[1] Order LII. applies to proceedings on the Revenue side of the King's Bench Division, although Order XXVII. as to dismissal for want of prosecution does not.[2]

## (ii.) *The Chancery Division.*

The Chancery Division consists of the Lord Chancellor, who is President,[3] and six puisne judges. These puisne judges are divided into three groups, each consisting of two judges, who deal with cases assigned to either of them, and to each group are attached four Masters with a staff of clerks working under them. The bulk of the work of the Chancery Division consists of equity business, to which its organisation is specially adapted. Nevertheless it administers law as well as equity, though it never tries a case with a jury.

Although the Judicature Act of 1873 gave the King's Bench Division power to hear and decide any equitable question incidentally raised in any cause or matter brought before that Division, or to grant any remedy or relief that the Court of Chancery would have granted before the passing of that Act, certain causes and matters are assigned to the Chancery Division and placed within its exclusive jurisdiction. These causes or matters include the administration of the estates of deceased persons, the dissolution of partnerships and the taking of partnership or other accounts, the redemption or foreclosure of mortgages, the raising of portions or other charges on land, the sale and distribution of the proceeds of property subject to any lien or charge, the execution of charitable or private trusts, the rectification or cancellation of deeds or other written documents, the specific

[1] *Att.-Gen.* v. *McCormack*, [1903] 2 Ir. R. 517.
[2] *Att.-Gen.* v. *Williamson* (1889), 60 L. T. 930.
[3] The Lord Chancellor seldom, if ever, sits as a judge of first instance, but he has jurisdiction as President over certain special matters, such, for instance, as the transfer of cases from or to the Chancery Division.

performance of contracts between vendors and purchasers of real estates, the partition or sale of real estates, the wardship of infants and the care of infants' estates, and proceedings under the Trustee Act, 1893.[1]

Any action, therefore, in reference to one of the above causes or matters should be brought in the Chancery Division. If it be commenced in some other Division, the Court or any judge of such Division may direct it to be transferred to the Chancery Division, and order the plaintiff to pay the costs thereby occasioned.[2] On the other hand, as all matters in the Chancery Division are tried by a judge alone, an order will, in a proper case, be made transferring an action to the King's Bench Division in order that it may be tried by a jury.[3] Such a trial cannot be demanded as of right, it is a matter for the discretion of the Court; and the burden of showing that the action ought to be tried with a jury lies on the applicant.[4]

A judge of the Chancery Division, when sitting in chambers, has the same power and jurisdiction as if he were sitting in open Court.[5] A set of chambers is attached to each group of two judges mentioned above. The business generally transacted in such chambers consists of interlocutory applications, proceedings that have originated primarily in chambers, proceedings that have been adjourned for hearing to chambers, proceedings on judgments and orders. The Master has power to deal with any matter which he is directed by the judge to hear and investigate, subject to any directions which the judge may have given. In all other respects the jurisdiction of a Master of the Chancery Division is the same as in the King's Bench Division. The winding-up of companies is now regulated by Part IV. of the Companies (Consolidation) Act, 1908,[6] and is transacted in the Department for Companies Winding-up, in which the

[1] 56 & 57 Vict. c. 53.
[2] See Judicature Act, 1875 (38 & 39 Vict. c. 77), s. 11 (2); and *In re Pollard* (1888), 20 Q. B. D. 656.
[3] See Order XXXVI., rr. 3, 7.
[4] *Timson* v. *Wilson* (1888), 38 Ch. D. 72; *Jenkins* v. *Bushby*, [1891] 1 Ch. 484.
[5] Court of Chancery Act, 1852 (15 & 16 Vict. c. 80), s. 15; Order LV.
[6] 8 Edw. VII. c. 69.

registrars perform the duties which devolve on the Masters in the Chancery Division.

(iii.) *The Probate, Divorce, and Admiralty Division.*

In this Division are now consolidated, by the Judicature Act, 1873, the three Courts of Probate, Divorce, and Admiralty. There are two judges of this Division—the President and one puisne judge. They are assisted by four registrars, who sit at Somerset House, and deal with summonses in probate and divorce matters.

The Lord High Admiral is known to have held a court as early as in the reign of Henry I.[1] This Court acquired jurisdiction over all wrongful acts, civil and criminal, committed on the high seas or in the main streams of great rivers below bridges. It administered a body of maritime law as adopted by itself from maritime customs and laws common to all nations and also from such codes of sea law as the laws of Oleron and the *Consolato del mare*. Its criminal jurisdiction was transferred in 1835 to the Central Criminal Court, and in 1844 it was also vested in the judges of assize. But its civil jurisdiction continued till 1875. In 1857 the Court of Probate was created by the statute 20 & 21 Vict. c. 77; it succeeded to the jurisdiction formerly exercised by the Ecclesiastical Courts over the wills and intestacies of dead persons. The goods of persons dying without wills were in olden times distributable *in pios usus*. The Church undertook this duty, and afterwards usurped jurisdiction over wills, as these were documents by which its title on an intestacy was superseded. In the same year 1857 was created the Divorce Court, which succeeded to the authority of the Ecclesiastical Courts over marriages, with the additional

[1] "It has been doubted whether the jurisdiction of the Admiralty Court or of the Lord High Admiral arose in the reigns of Edward III. or Richard I. or Henry I.; but, whenever it arose, it arose at a time when the distinction did not exist between local and transitory actions, and the Courts of this country had no jurisdiction to entertain actions which did not arise within a county": *per* Fry, L. J., in *Turner* v. *Mersey Docks and Harbour Board*, [1892] P. at p. 300; and see 13 Rich. II. st. 1, c. 5; 15 Rich. II. c. 3. The Court fell into abeyance during the Commonwealth, but was revived after the Restoration. See the account of the ceremony on March 13th, 1663, given by Pepys in his Diary (1828 ed.), vol. ii. at p. 17.

power of decreeing the dissolution of these "religious contracts," which until then could only be effected by an Act of Parliament.

The most important Admiralty actions are brought not against a person but against a ship or cargo, in order to enforce a maritime lien. These are called actions *in rem*, because in them the plaintiff claims that the ship or cargo, if within the jurisdiction of the Court, be arrested and detained until the sum due to him be paid or secured or judgment be given in the action. Such actions are:

(*a*) the action of damage by collision or otherwise to ship or cargo;

(*b*) the action on a bottomry bond, by which money is lent at a high premium on the chance of the ship arriving safely;

(*c*) the *respondentia* action, in which the cargo alone has been pledged in the same way;

(*d*) the action of possession in which an owner, mortgagee, or other person claims to be allowed to take possession of the ship;

(*e*) the action for salvage, or for towage, in which reward is claimed for assisting a vessel in distress, or for towing her;

(*f*) the action for pilotage;

(*g*) the action for masters' and seamen's wages in respect of service on board the ship; and

(*h*) the action for necessaries supplied to the ship in port.

There are also Admiralty actions *in personam*, in which a maritime lien is not claimed. Admiralty actions have in some respects a procedure of their own.[1]

Probate actions determine the validity of a will as a whole, whether in respect of the capacity of the testator or of its true execution, but not the construction of the will, which is for the Chancery Division. They also determine who is entitled

[1] See, for instance, Order XIII., r. 12A; Order XIX., r. 28; Order XX., r. 3; Order XXVII., r. 11A; Order XXX., r. 1D.

to letters of administration in a case of intestacy. They are of three kinds:—

(*a*) The action for propounding a will in solemn form.

(*b*) The interest action, in which the plaintiff claims to have letters of administration granted to him as one of the next of kin of the deceased intestate.

(*c*) The revocation action, in which it is sought to revoke a probate granted in common form or letters of administration.

The Court has jurisdiction whenever the deceased person at the time of his death owned land or personalty in England, or personalty in transit to England. It does not matter where the will was made, or whether the deceased was a British subject or not, or whether he was domiciled in England or not.

The most important matrimonial causes are suits for—

(*a*) nullity of marriage,

(*b*) divorce *a vinculo matrimonii*,

(*c*) judicial separation,

(*d*) restitution of conjugal rights,

(*e*) alimony.

The Court has jurisdiction to dissolve any marriage, whether celebrated in England or not, if the parties are domiciled in England at the time when the proceedings for a divorce are commenced.[1] In other matrimonial causes "residence, not domicil, is the test of jurisdiction."[2] The rules of the Supreme Court do not affect the procedure or practice in divorce or other matrimonial causes; the procedure of the former Ecclesiastical Courts by petition, &c., is retained.[3]

The two judges of the Probate, Divorce, and Admiralty Division sometimes form a Divisional Court to hear appeals from county courts exercising Probate or Admiralty jurisdiction, and from Courts of petty sessions exercising jurisdiction

[1] *Bater* v. *Bater*, [1906] P. 209.
[2] *Per* Jeune, P., in *Roberts* v. *Brennan*, [1902] P. at p. 144; *Le Mesurier* v. *Le Mesurier*, [1895] A. C. at p. 531.
[3] Order LXVIII. r. 1D.

under the Summary Jurisdiction (Married Women) Act, 1895,[1] and from wreck commissioners.

## II.—The Court of Appeal.

This Court is composed of the Master of the Rolls and five "Lords Justices of Appeal," with the occasional assistance of the Lord Chancellor, the ex-Lord Chancellor, the Lord Chief Justice of England, and the President of the Probate, Divorce, and Admiralty Division, who are *ex-officio* judges of the Court. The Court sits in two divisions; the Master of the Rolls presides in the first Court, and the senior Lord Justice in the second Court. The Master of the Rolls and the Lords Justices are appointed by the Prime Minister. They must have been judges of the High Court for at least one year, or barristers of fifteen years' standing. Final appeals and motions for new trials are heard by three judges; interlocutory appeals by two judges.[2]

The Court of Appeal has power to hear and determine appeals from any judgment or order of the High Court of Justice or any judge thereof, whether sitting in the Royal Courts or on circuit, and whether in a Divisional Court or at *Nisi Prius* or at judges' chambers. There are, however, limitations imposed by statute or by rules of Court, which (*a*) confer appellate jurisdiction on Divisional Courts, and prescribe that the appeal from the original Court shall, in the first place, at any rate, lie to such Courts; or, (*b*) restrict the right of appeal in particular cases. The Court of Appeal also hears motions for new trials, and motions to set aside a verdict where there has been a trial by jury. All appeals are by way of re-hearing. An appeal from the decision of a judge of the High Court, sitting at chambers on any matter of practice and procedure, also lies to the Court of Appeal. For all the purposes of and incidental to the hearing and determination of any such appeal, and the amendment, execution and enforcement of any judgment or order made

[1] 58 & 59 Vict. c. 39, *post*, pp. 1034, 1035.

[2] As to the jurisdiction in lunacy of the Lords Justices, see *post*, p. 1371.

on such appeal, the Court of Appeal has all the power, authority and jurisdiction vested in the High Court of Justice.

It also hears appeals :—

(*a*) From any judgment or order of the Chancellors of the Palatine Courts of Lancaster and of Durham.[1]

(*b*) From a decision on a point of law of the Court of Railway and Canal Commission.[2]

(*c*) From an order of the judge of the Liverpool Court of Passage.[3]

(*d*) From an order of a county court judge on a question of law submitted to him for his decision by an arbitrator appointed under the Workmen's Compensation Act, 1906.[4]

(*e*) From an order of a county court judge on a case stated by an arbitrator under the Agricultural Holdings Act, 1908.[5]

## III.—The House of Lords.

This Court forms no part of the Supreme Court of Judicature, and it has no original jurisdiction in ordinary civil actions;[6] but an appeal lies to it against any judgment or order of the Court of Appeal. When the House sits to hear such appeals, it is usually composed of the following persons: the Lord Chancellor, the ex-Lord Chancellor, if any, and the four Lords of Appeal in ordinary; such peers as have held high judicial office (*e.g.*, the office of Lord Chancellor, of a salaried judge of the Judicial Committee of the Privy Council, or of the Supreme Court of England or Ireland, or of the Court of Session) are also entitled to sit. At least three members of the Court must be present. The Lords of Appeal are appointed by letters patent.[7] They must either have held high judicial office for two years, or have been for fifteen years practising barristers in England or Ireland, or practising advocates in Scotland. They hold office during good

[1] 53 & 54 Vict. c. 23, s. 4; 52 & 53 Vict. c. 47, s. 11; see *post*, pp. 1016, 1017.

[2] 51 & 52 Vict. c. 25, s. 17 (2); see *post*, p. 1018.

[3] 56 & 57 Vict. c. 37, s. 10; see *post*, p. 1027.

[4] 6 Edw. VII. c. 58; see Workmen's Compensation Rules, 1907 (r. 71) and 1909, and *post*, p. 1027.

[5] 8 Edw. VII. c. 28; see s. 13 (3), and County Court (Agricultural Holdings) Rules, 1909.

[6] *Skinner* v. *East India Co.* (1667), 6 St. Tr. 710.

[7] See Appellate Jurisdiction Act, 1876 (39 & 40 Vict. c. 59), ss. 5, 6; and Appellate Jurisdiction Act, 1887 (50 & 51 Vict. c. 70), s. 2.

behaviour and are entitled to sit and vote as Lords of Parliament during their lives. All lay peers, indeed, have, strictly speaking, the same right to vote on judicial as they have on legislative matters. This right, however, has fallen into disuse, and since 1883 no lay peer has attempted to exercise it.

The practice on appeals to the House of Lords is regulated by the Appellate Jurisdiction Acts, 1876 and 1887, by the Appeal (*Formâ Pauperis*) Act, 1893, and by certain Standing Orders of the House.[1]

The House of Lords has power in all cases to summon the judges to attend and assist it in its deliberations by giving their opinion on any points of law.

The House of Lords also exercises civil jurisdiction in cases of claims to peerages. Such claims, which were originally heard before the King in Parliament, have since the reign of Charles II. been decided by a committee of the full House of Lords on reference from the King, who acts upon the resolution of such committee.

It also decides questions as to disputed elections of the sixteen representative peers of Scotland,[2] and of the twenty-eight representative peers of Ireland,[3] and also questions of claims to vote on such elections. An Act of Parliament is still necessary to dissolve the marriage of persons having an Irish domicil, for the Court of Ireland has only power to grant a divorce *a mensâ et thoro*. These Irish Divorce Bills are always introduced into the House of Lords.[4]

## IV.—The Judicial Committee of the Privy Council.

Besides its executive business, the Privy Council exercises important judicial functions as a Court of Final Appeal from the ecclesiastical Courts and from the Courts of India, the colonies, the Channel Islands and the Isle of Man. Such appeals are known as appeals to the King in Council, and down to the year 1833 were few in number and were generally heard by committees of the Council specially appointed for each case, and usually in vacation time when the judges were free to attend. But in 1833 a statute was passed, which

[1] 56 & 57 Vict. c. 22. The Orders will be found in the Annual Practice, 1910, Vol. II., pp. 809—835; and in Denison and Scott's House of Lords Practice.

[2] Union with Scotland Act, 1706 (5 & 6 Anne, c. 8).

[3] Scottish Representative Peers Act, 1707 (6 Anne, c. 78); Representative Peers (Scotland) Act, 1847 (10 & 11 Vict. c. 52).

[4] As to the jurisdiction of the House of Lords as a Final Court of Appeal in criminal cases, see *ante*, pp. 990, 991.

constituted the Judicial Committee of the Privy Council.[1] It consists of the Lord Chancellor, the four Lords of Appeal, if Privy Councillors, and such other members of the Privy Council as have held any high judicial office in the United Kingdom or the Colonies. It is the ultimate Court of Appeal for upwards of 350 millions of persons.

The proceedings commence by the appellant lodging a petition of appeal to the Right Honourable the Lords of the Judicial Committee, to which the respondent must enter a formal appearance by giving notice in writing to the registrar. If he fails to do so, the appellant can serve a peremptory order calling on him to appear within six weeks, at the end of which time, if the respondent is still in default, the appellant can set down the appeal *ex parte*. If the respondent appears, he must lodge his answer to the petition. Both the petition and answer must contain an abstract of the facts as to which the appeal has arisen, together with a short statement of the reasons offered by the parties for the reversing or affirming the judgment of the Court below. When both the petition and answer are lodged, the appeal is set down and heard. Only one judgment is delivered; in this the Committee states the reasons for which it will advise His Majesty to allow or dismiss the appeal. Their decision is then reported to the King in Council.

## V.—Other Superior Courts.

There are also other superior Courts of record, which have jurisdiction only over certain counties, or which have been created in modern times for certain special purposes. They form no part of the Supreme Court of Judicature. We can only deal here very briefly with:—

(i.) The Chancery Court of the County Palatine of Lancaster.

(ii.) The Chancery Court of the County Palatine of Durham.

(iii.) The Court of Railway and Canal Commission.

### (i.) *The Chancery Court of the County Palatine of Lancaster.*

The Vice-Chancellor of the Duchy and County Palatine of Lancaster is the sole judge of this Court, which is a superior Court of record. He sits alternately at Liverpool and

[1] 3 & 4 Will. IV. c. 41.

Manchester; there is a registrar and an office of this Court at each of these cities, and also at Preston. The jurisdiction of the Court is limited in area, but unlimited in amount. It is essential that the parties to the action should be within the county palatine, though not the property which forms the subject-matter in dispute.[1] Within the county palatine this Court has the same powers and jurisdiction as the Chancery Division of the High Court.[2] It also possesses the summary jurisdiction of the Chancery Division,[3] statutory jurisdiction over the property of infants and other persons under disability,[4] power to administer assets, and to wind up any limited company whose registered office is within the county. It has also jurisdiction under the Conveyancing Act, 1881,[5] the Trustee Act, 1893,[6] and the Judicial Trustee Act, 1896.[7] An appeal lies to the Court of Appeal, and thence to the House of Lords.

(ii.) *The Chancery Court of the County Palatine of Durham.*

The County Palatine of Durham has also a Court of its own, which is a superior Court of record. The sole judge of this Court is the Chancellor of the County Palatine, who sits in the Shire Hall of the City of Durham. Its jurisdiction is unlimited in amount, but, apart from statute, either the property which is the subject-matter of the action must be situate, or the parties must reside, within the county. If the parties reside within jurisdiction, it is immaterial where the property is situate. The jurisdiction of the Court has been extended by various statutes. For example, the Palatine Court of Durham Act, 1889,[8] has conferred upon it jurisdiction to administer assets and to deal with the property of infants or other persons under disability, and all the summary jurisdiction of the Chancery Division. It has power to wind

[1] *In re Longdendale Cotton Spinning Co.* (1878), 8 Ch. D. 150.
[2] Chancery of Lancaster Act, 1890 (53 & 54 Vict. c. 23), s. 3.
[3] Chancery of Lancaster Act, 1850 (13 & 14 Vict. c. 43), s. 11.
[4] Chancery of Lancaster Act, 1854 (17 & 18 Vict. c. 82), s. 12.
[5] 44 & 45 Vict. c. 41, s. 69.
[6] 56 & 57 Vict. c. 53, s. 46.
[7] 59 & 60 Vict. c. 35, s. 2.
[8] 52 & 53 Vict. c. 47, ss. 6, 7.

up any limited company, whose registered office is within the county. It has jurisdiction under the Charitable Trusts Acts, 1853 to 1869, the Partition Acts, 1868 and 1876, the Settled Estates Act, 1877, the Conveyancing Act, 1881, the Settled Land Acts, 1882 to 1890.[1] It has also jurisdiction under the Trustee Act, 1893,[2] and the Judicial Trustee Act, 1896.[3] An appeal lies to the Court of Appeal and thence to the House of Lords.[4]

Formerly the Palatine County of Lancaster had a Court of Common Pleas, and the Palatine County of Durham a Court of Pleas, but the jurisdiction of both these Courts was vested in the High Court by section 16 of the Judicature Act, 1873.[5]

The County of Chester was also formerly a county palatine, and had Palatine Courts of its own, but these were abolished by Act of Parliament in 1830.

### (iii.) *Court of Railway and Canal Commission.*

This Court was created by the Railway and Canal Traffic Act, 1888.[6] It consists of a judge of the High Court, who presides,[7] and of two other persons, not judges, appointed by the Crown on the recommendation of the President of the Board of Trade, one of whom must be an expert in railway matters. The President alone decides points of law. It is the duty of this Court to enforce the provisions of the Railway and Canal Traffic Act, 1854,[8] and of other special Acts, which provide that railway and canal companies shall afford reasonable facilities for carrying traffic over their systems, and shall not give any undue preference to any particular person or company, or any particular description of traffic. If complaint be made to the Court on any of these grounds, it has power to order the company complained of to obey the provisions of these Acts or to restrain it by injunction

[1] 52 & 53 Vict. c. 47, ss. 8—10.
[2] 56 & 57 Vict. c. 53, s. 46.
[3] 59 & 60 Vict. c. 35, s. 2.
[4] 52 & 53 Vict. c. 47. s. 11.
[5] 36 & 37 Vict. c. 66.
[6] 51 & 52 Vict. c. 25.
[7] When a Scotch or Irish railway is concerned, a judge of the Court of Session in Scotland or of the High Court of Ireland presides: s. 4.
[8] 17 & 18 Vict. c. 31.

from disobeying them. It may also order the company to pay a sum not exceeding £200 for every day after a day named in the order that the company fails to obey the order or injunction; and further it may, in addition to or in lieu of any other relief, award damages to the complainant.[1] The Court has also jurisdiction to decide as to the legality of any toll, rate, or charge for the carriage of any merchandise,[2] and to determine any dispute with respect to the "terminal charges" of any railway company, *e.g.*, for loading and unloading, covering and delivering goods where such charges have not been fixed by statute, and to decide what would be a reasonable charge for such work.[3] Further it has power to determine any complaint as to an increase since 1892 by a railway company in any rate or charge, provided the matter has first come before the Board of Trade.[4] In short, its duty is to safeguard the interests of the general public and to protect them from the evils of monopoly.

The Commissioners have all the powers, rights and privileges of a superior Court with respect to the attendance and examination of witnesses, the production and inspection of documents, the entry on, and inspection of, property, and the enforcement of their orders.[5] They may also, subject to the approval of the Lord Chancellor and the President of the Board of Trade, make rules for their procedure and practice and subsequently vary them.[6] There is no appeal from the commissioners on any question of fact, but on a question of law an appeal lies to the Court of Appeal.[7]

All the powers and jurisdiction of this Court, and the law administered by it, are statutory. It decides matters which no other Court can decide. If a man makes a contract with a railway company to carry goods at a certain rate, he must pay this rate; it will be no defence to an action at law for him to subsequently allege that such rate is unreasonable; but this would be a good ground for complaint to the Court of Commission.

[1] 51 & 52 Vict. c. 25, s. 12.
[2] *Ib.*, s. 10.
[3] 36 & 37 Vict. c. 38, s. 15.
[4] 57 & 58 Vict. c. 54, s. 1. The same proviso applies to through rates.
[5] 51 & 52 Vict. c. 25, s. 18.
[6] *Ib.*, s. 20.
[7] *Ib.*, s. 17.

The principal statutes under which the Court acts are the following :—

1. The Railway and Canal Traffic Act, 1854,[1] which entitles the public to reasonable facilities for the receiving, forwarding, and delivering of passengers and goods.

2. The Regulation of Railways Act, 1873,[2] under which proceedings may be taken against a company which refuses to publish its rates.

3. The Railway and Canal Traffic Act, 1888,[3] which deals with "through rates" and "undue preference."

4. The Railway and Canal Traffic Act, 1894,[4] which gives the Court jurisdiction to hear and determine complaints as to the increase of rates and charges made for unloading on a private siding.

A "reasonable facility" must be a convenience to the public at large, not merely to a private individual. The public is entitled to all such reasonable facilities as the company can reasonably be expected to provide, such, for instance, as a cloak-room,[5] a waiting-room, and proper platforms, but not a refreshment-room.[6] The junction of any private siding or private branch railway is now declared to be a reasonable facility.[7] But the Court of Commission cannot compel the railway to do a specific thing ; it will not constitute itself a manager of the company. The granting of through rates is a reasonable facility ; and either a trader interested in the traffic or another railway company may demand a through rate. The Commissioners are specially inclined to order a through rate when it will generate competition.

An "undue preference" exists, whenever a railway company charges A. less than it charges B. for carrying the same class of merchandise, provided A. and B. are competing traders using the same railway or canal. A railway company may urge in excuse that the preference is necessary to secure in the public interests the traffic for which it is made, or that the inequality cannot be removed without unduly lowering the reasonable rate.[8] When a railway company has increased its rates, the *onus* lies upon it to establish that the conditions are changed so as to justify the increase.[9]

[1] 17 & 18 Vict. c. 31. The provisions of this Act were extended in 1868 to steam vessels worked by a railway company : 31 & 32 Vict. c. 119, s. 16.
[2] 36 & 37 Vict. c. 48.
[3] 51 & 52 Vict. c. 25.
[4] 57 & 58 Vict. c. 54.
[5] *Singer Manufacturing Co.* v. *L. & S. W. Ry. Co.*, [1894] 1 Q. B. 833.
[6] *S. E. Ry. Co.* v. *Railway Commissioners* (1881), 6 Q. B. D. 586.
[7] 4 Edw. VII. c. 19, s. 2.
[8] See *Holwell Iron Co., Ltd.* v. *Midland Ry. Co.*, [1910] 1 K. B. 296.
[9] 57 & 58 Vict. c. 54, s. 1.

## Chapter V.

### INFERIOR CIVIL COURTS.

In ancient days it was the rule of the King's Court that its clerk should record in writing all the proceedings of the Court. The parchment rolls on which these matters were stated were carefully preserved for future reference. Each action had its separate record. These records were originally intended only to serve as aids for the memories of the judges, but subsequently it became a settled principle that nothing could be averred or proved against their contents.

Whenever it is the custom of a Court to keep a record of the proceedings before it, such Court is a "Court of Record." All superior Courts are Courts of Record. In humbler tribunals, however, it was not the custom—in early times, at all events—to keep any such formal records, and these were therefore classed as "Courts not of Record."

Even among Courts of Record a distinction came to be recognised as soon as the ascendency of the King's Court was established over local tribunals. Courts of Record were divided into Superior and Inferior Courts of Record, the latter being so called because, like Courts not of Record, their proceedings are subject to the supervision of the High Court of Justice or some other Superior Court. This supervision is exercised by means of various writs, of which the writs of *Mandamus*, *Certiorari*,[1] and Prohibition are the most important.[2] There are other respects in which such Courts differ from Superior Courts of Record: for instance, with

[1] Any proceeding in the county court may by the order of a Master be removed into the High Court by writ of *certiorari*, if difficult questions of law will arise in it, or for any other reason which the Master thinks sufficient, and on such terms as to payment of costs, giving security, or otherwise as the Master may think fit to impose: 51 & 52 Vict. c. 43, s. 126; and see *Rees* v. *Williams* (1851), 7 Exch. 51; *Parker* v. *Bristol and Exeter Ry. Co.* (1851), 6 Exch. 184; *Longbottom* v. *Longbottom* (1852), 8 Exch. 203, 208.

[2] See *post*, pp. 1163–1170.

regard to the immunity of the judges for acts done or words spoken while discharging their judicial functions,[1] and the power of committal for contempt of Court.[2] Moreover, at the present day, as we shall see,[3] an appeal lies, subject to certain conditions, from almost every Inferior Court either to a Divisional Court or to the Court of Appeal.

Our Courts, therefore, are divided into three classes :—

(i.) Superior Courts of Record.

(ii.) Inferior Courts of Record.

(iii.) Inferior Courts not of Record.

Superior Courts of Record include the House of Lords, the Judicial Committee of the Privy Council, the Court of Appeal, the Court of Criminal Appeal, the High Court of Justice, and any Divisional Court and any judge of any Division sitting in Court alone.[4] Also the Central Criminal Court, and all Courts held under any commission of oyer and terminer, assize, gaol delivery or Nisi Prius. The Courts of Chancery of the Counties Palatine of Lancaster and Durham and the Court of Railway and Canal Commission are also Superior Courts of Record.

On the other hand, the Mayor's Court, London ; the City of London Court ; the Tolzey Court of Bristol ; the Salford Hundred Court ; the Court of Passage, Liverpool ; all County Courts ; Courts of Quarter Session ; Sheriffs' Courts ; and Coroners' Courts, are Inferior Courts of Record. But Courts of Petty Sessions, Revising Barristers' Courts, Courts of Pie Poudre, clerk of the market and staple, the Court of the Duchy Chamber of Lancaster, and all Manorial Courts are Inferior Courts not of Record.

The most important of the Inferior Courts of Record is the County Court.

### County Courts.

England and Wales are divided into 566 County Court districts, in each of which, as a rule, a Court is held by one of the fifty-seven County Court judges once in every month of the year, except September.[5] These Courts were created by the County Court Act, 1846,[6] but their jurisdiction has since that date been increased to a remarkable extent.

[1] See *ante*, pp. 476, 477, 525.
[2] See *ante*, p. 196.
[3] See *post*, pp. 1026–1028, 1031–1033.
[4] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 39.
[5] Some Courts are bi-monthly, while in many the sittings are oftener than once a month.
[6] 9 & 10 Vict. c. 95.

It now depends mainly on three things :—

(i.) The place where the defendant resides, or the property in dispute is situated.

(ii.) The nature of the plaintiff's claim.

(iii.) The amount of the claim.

An ordinary county court action must, as a rule, be commenced in the court of the district in which the defendant resides or carries on business. But it may, by leave of a judge or registrar, be commenced in the court of the district in which the defendant lived or carried on business within the last six months, or with the like leave in the court of the district where the cause of action wholly or in part arose.[1] Any proceedings relating to a charge or lien on lands, &c., or to partition, or to proceedings under the Trustee Acts, or to the administration of the assets of a deceased person, or to any partnership, must be respectively commenced in that court within the district of which the lands, &c., or any part thereof, are, or the persons making the application under the Trustee Acts reside, or the deceased last lived, or the partnership business was carried on.[2]

The ordinary jurisdiction of the county court now extends to all personal actions where the debt, demand, or damage claimed, whether on balance of account or otherwise, does not exceed £100 ; and, further, to any action (a) where the debt or demand claimed is reduced by an admitted set-off to £100 ; (b) for the recovery of any demand not exceeding £100, which is the whole or part of the unliquidated balance of a partnership account, or of a distributive share under an intestacy or of any legacy ; (c) in ejectment, where neither the value of the lands, &c., claimed nor the rent thereof exceeds £100 by the year, subject to the defendant or his landlord having the right to apply within one month to a judge of the High Court to order such action to be tried in the High Court in any case where the title to other lands, &c., of greater annual value than £100 would be affected ;

[1] 51 & 52 Vict. c. 43, s. 74. As to the metropolis, see s. 84.
[2] *Ib.*, s. 75.

(d) to try the title to any corporeal or incorporeal hereditament, where neither the value of the lands, &c., nor the rent payable, nor in case of an easement or licence, where neither the value nor reserved rent of the lands, &c., in respect of which, or on, through, over, or under which such easement or licence is claimed, exceeds the sum of £100 by the year.[1] Save that a county court cannot, except by consent, try any action (1) in which the title to any toll, fair, market, or franchise[2] shall be in question, (2) for libel or slander, (3) for seduction, or (4) for breach of promise of marriage.[3]

A cause of action for more than £100 may not be divided to enable a plaintiff to bring two or more actions in the county court for portions of the same claim. But the plaintiff may, if he thinks fit, abandon the excess and take judgment for £100 in full discharge of the cause of action.

The court can grant an injunction in any case where an injunction can be granted, provided not more than £100 damages are claimed.

The county court also has a considerable jurisdiction in equity. It has all the powers and authority of the High Court in the following matters :—

An administration action by creditors, legatees, devisees, heirs-at-law, or next of kin ;

An action for the execution of a trust ;

An action for the foreclosure, redemption, or enforcement of any charge or lien ;

An action for the specific performance of, or the reforming or cancelling of, any agreement for the sale, purchase, or lease of property ;

An action under the Trustee Acts, the Trustee Relief Acts, &c. ;

An action relating to the maintenance or advancement of infants ;

[1] *Ib.*, ss. 56—60, as amended by 3 Edw. VII. c. 42, s. 3.
[2] Including an action for infringement of a patent : *R.* v. *County Court Judge of Halifax*, [1891] 2 Q. B. 263.
[3] 51 & 52 Vict. c. 43, s. 56.

An action for the dissolution or winding up of any partnership;

An action for relief against fraud or mistake;

provided the estate, fund, property or assets concerned, or the mortgage charge or lien claimed, or the damage sustained, does not exceed in amount or value £500.[1]

The jurisdiction of a county court can be extended so as to include a claim for any amount in any common law action, if the parties to any such action agree in writing, signed by themselves or their solicitors, that a particular Court shall have jurisdiction to try their case. But in equity actions and matters jurisdiction cannot be extended or given by consent. If during the progress of any action or matter a want of jurisdiction appears, it is the duty of the judge to direct the transfer of the action or matter to the Chancery Division of the High Court.[2] A judge of that Division has power, at the instance of any party, to make an order at chambers authorising the action or matter to proceed in the county court.

In all our larger provincial towns the county court is also a Court of Bankruptcy, and has in bankruptcy matters all the powers and jurisdiction of the High Court.[3] Several county courts have also jurisdiction in Admiralty—a jurisdiction, indeed, which in some respects exceeds that of the Probate, Divorce, and Admiralty Division of the High Court.[4]

The county court has exclusive jurisdiction under several Acts, such as—

The Agricultural Holdings Act, 1908;[5]
The Alkali, &c., Works Regulation Act, 1906;[6]
The Employers and Workmen Act, 1875;[7]
The Employers' Liability Act, 1880;[8]
The Married Women's Property Act, 1882;[9] and
The Workmen's Compensation Act, 1906.[10]

It can also, under the Companies (Consolidation) Act, 1908,[11] wind up any company whose paid-up capital is less than £10,000. It has extensive

[1] *Ib.*, s. 67.
[2] *Ib.*, s. 68.
[3] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 92, 99, 100; *Skinner* v. *Northallerton County Court Judge* (1889), 6 Manson, 274.
[4] *Cargo ex "Argos"* (1873), L. R. 5 P. C. 134.
[5] 8 Edw. VII. c. 28.
[6] 6 Edw. VII. c. 14.
[7] 38 & 39 Vict. c. 90.
[8] 43 & 44 Vict. c. 42.
[9] 45 & 46 Vict. c. 75.
[10] 6 Edw. VII. c. 58.
[11] 8 Edw. VII. c. 69, s. 131 (3).

powers under the Allotments Acts, 1908 ;[1] the Building Societies Acts, 1874 and 1894 ;[2] the Commons Act, 1876 ;[3] the Factory and Workshop Act, 1901 ;[4] the Friendly Societies Act, 1896 ;[5] the Industrial and Provident Societies Act, 1893 ;[6] the Local Loans Act, 1875 ;[7] the Locomotives Act, 1898 ;[8] the Lunacy Act, 1890 ;[9] the Riot (Damages) Act, 1886 ;[10] the Rivers Pollution Prevention Act, 1876 ;[11] the Settled Land Acts, 1882 to 1890 ;[12] the Solicitors Act, 1870 ;[13] and the Tenants Compensation Act, 1890.[14]

The judge, who must be a barrister of at least seven years' standing, is appointed by the Lord Chancellor, except where the whole of the district is within the Duchy of Lancaster, in which case the Chancellor of that Duchy appoints ; he cannot sit in Parliament, nor can he practise or act as arbitrator for remuneration to himself. The judge, in case of illness or unavoidable absence, may appoint a deputy, but no deputy can act for more than fourteen days at a time without the approval of the Lord Chancellor.

The chief officers of the county court are the registrar and the high bailiff ; in a few instances the two offices are held by the same person. One registrar at least is appointed to each court, and no person can be registrar of more than one court ; he must be a solicitor of at least five years' standing, and is appointed by the judge, subject to the approval of the Lord Chancellor, but he can only be removed from his office by the Lord Chancellor.[15] He must, on a vacancy in the office of high bailiff, exercise the powers and perform the duties of that office, unless the Lord Chancellor otherwise determines.[16] The accounts of the registrars are audited by

[1] 8 Edw. VII. c. 36.
[2] 37 & 38 Vict. c. 42 ; 57 & 58 Vict. c. 47.
[3] 39 & 40 Vict. c. 56.
[4] 1 Edw. VII. c. 22.
[5] 59 & 60 Vict. c. 25.
[6] 56 & 57 Vict. c. 39.
[7] 38 & 39 Vict. c. 83.
[8] 61 & 62 Vict. c. 29.
[9] 53 Vict. c. 5.
[10] 49 & 50 Vict. c. 38.
[11] 39 & 40 Vict. c. 75.
[12] 45 & 46 Vict. c. 38 ; 47 & 48 Vict. c. 18 ; 52 & 53 Vict. c. 36 ; 53 & 54 Vict. c. 69.
[13] 33 & 34 Vict. c. 28.
[14] 53 & 54 Vict. c. 57.
[15] In the County Palatine of Lancaster by the Chancellor of the Duchy of Lancaster : 51 & 52 Vict. c. 43, ss. 27, 33.
[16] *Ib.*, s. 37.

the County Courts Department of the Treasury. In bankruptcy matters the registrar has powers similar to those of a registrar in the High Court—except that the registrar of a county court cannot discharge a debtor or approve a composition or scheme which is opposed by any creditor.

The high bailiff's duties consist in serving the summonses and orders and executing all the warrants issued out of the court; he is made responsible for the acts and defaults of himself and his officers. The remuneration is by salary and allowances; he is also entitled to retain for his own use the fees received for keeping possession of goods under executions. The high bailiff is appointed by the judge, but he can only be removed from his office by the Lord Chancellor. The bailiffs who serve under him are appointed by the certificate of the judge, who has power to suspend or dismiss them.[1]

No officer may by himself or his partner act directly or indirectly as solicitor for any party in the court, subject to a penalty of £50.[2]

In order that the suitors may know, a convenient time beforehand, when the courts will be held, the judge must appoint the days and hours of holding each of his courts; and notice of such days and hours must be affixed in some conspicuous place in the court-house and in the office of the registrar three calendar months beforehand.[3]

The judge has discretion over the costs of every action in the county court, whether it be tried by a jury or not, whether it be remitted from the High Court or not. Such discretion must, of course, be exercised judicially, but is not restricted by any provision as to "good cause." In the absence of any special direction, the costs will follow the event; in the case of a remitted action the costs of the proceedings in the High Court will be allowed according to the scale in use in the High Court, the costs incurred since the order to remit according to the county court scale.[4]

Appeals from the decisions of a county court judge, as a rule, lie to a Divisional Court of the King's Bench Division.

[1] 51 & 52 Vict. c. 43, s. 33.
[2] *Ib.*, s. 41.
[3] County Court Order I., r. 1.
[4] 51 & 52 Vict. c. 43, s. 113.

In certain cases, however, such as those arising under the Workmen's Compensation Act, 1906, the appeal lies direct to the Court of Appeal. In bankruptcy matters, appeal lies to a Divisional Court of the King's Bench Division sitting in Bankruptcy, of which Court the judge in Bankruptcy must be a member, and thence to the Court of Appeal—but only by leave of the Divisional Court.

## Borough Courts of Record.

During the Middle Ages, as soon as any town grew to sufficient size and importance, it eagerly petitioned to be incorporated into a borough and to be given a court of its own. Our Norman and Plantagenet Kings readily granted charters establishing in each new borough a civil court of record in which the disputes between the burgesses could be determined. The officer who wrote and preserved the records of each such court was called a Recorder. There have been created at different times no less than 215 borough courts. Of these only nineteen now actively exercise judicial functions. Their jurisdiction is generally limited to causes of action arising within the borough, but unlimited as to the amount which can be claimed in the action. In most of them the Recorder of the borough is the judge.

An appeal lies from all these courts to the King's Bench Division of the High Court of Justice,[1] except in the case of the Liverpool Court of Passage, an appeal from which lies direct to the Court of Appeal.[2]

The most prominent of these borough courts are:—

The Mayor's Court, London.
The City of London Court.
The Liverpool Court of Passage.
The Salford Hundred Court.[3]
The Courts of Tolzey and Pie Poudre at Bristol.

[1] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 45; Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1 (5). As to the Mayor's Court, see *post*, p. 1028.

[2] Liverpool Court of Passage Act, 1893 (56 & 57 Vict. c. 37), s. 10; *Anderson* v. *Dean*, [1894] 2 Q. B. 222; *Coates* v. *Moore*, [1903] 2 K. B. 140.

[3] This Court is regulated in the main by the Salford Hundred Court of Record Act, 1868 (31 & 32 Vict. c. cxxx.).

### *The Mayor's Court of London.*

This ancient court of record is a local court for the City of London. It holds its sittings eleven times a year at the Guildhall. The Recorder of London, or in his absence the Common Serjeant, presides. The court possesses equitable as well as legal jurisdiction. It has also exclusive jurisdiction in many causes arising out of City customs. This jurisdiction is unlimited in actions of contract, tort and ejectment, but it has no jurisdiction in replevin. Except in cases falling under the Mayor's Court of London Procedure Act, 1857,[1] the whole cause of action must have arisen within the City; in cases within the statute it is sufficient if the cause of action arises wholly or in part within the City. If, however, the defendant at the commencement of the action dwells or carries on business, or at some time within six months before the commencement of the action has dwelt or carried on business, within the City of London or the liberties thereof, and the amount claimed for debt or damages does not exceed £50, no plea to the jurisdiction can be raised.[2]

On the appellant giving security for costs, an appeal lies in cases of error on the record to the Court of Appeal; in other cases to the King's Bench Division. Leave of the judge of the Mayor's Court to appeal is, however, necessary where the claim is under £20.

### *City of London Court.*

This Court was created by the City of London Small Debts Extension Act, 1852.[3] It is now to all intents and purposes a county court.[4] It has jurisdiction where the defendant is "employed" in the City, or has been so within six months of the accrual of the cause of action.[5] It has also a limited jurisdiction in Admiralty cases, in the winding up of

[1] 20 & 21 Vict. c. clvii.
[2] *Ib.*, s. 12; and see *Read* v. *Brown* (1888), 22 Q. B. D. 128.
[3] 15 & 16 Vict. c. lxxvii.
[4] County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 185.
[5] *Kutner* v. *Phillips*, [1891] 2 Q. B. 267.

companies, and over certain questions arising out of City elections.[1]

It is impossible in this book to give any account of the procedure in the borough courts. Each has, in fact, a practice of its own. Some courts still preserve the procedure which prevailed in the three Superior Courts at Westminster before the Judicature Act; others have adopted many of the Rules of the Supreme Court.

In the Mayor's Court, London, the parties are allowed to draft their pleadings either under the Common Law Procedure Acts or under the Judicature Acts, whichever method they may prefer. But the plaintiff still, as a rule, continues to employ with or without other counts an ancient count which was in use in that court for centuries before the first Common Law Procedure Act, and which is known as a Count *Sur concessit solvere*, *i.e.*, a claim based upon a promise to pay. Under this count the plaintiff can sue for any liquidated demand, such as money received to the use of the plaintiff, or money due to him for work and labour done, goods sold, on an account stated, or under a bill of exchange, promissory note, &c.; but not for money due under a covenant. Particulars defining more precisely the nature of the claim must, however, be delivered with the declaration.

COUNT *SUR CONCESSIT SOLVERE.*

In the Mayor's Court, London.

2nd day of November, 1910.

Andrew Brown by John Smith, his solicitor, demands against Charles Davies thirty-five pounds ten shillings of lawful money of Great Britain, which he owes to and unjustly detains from the said plaintiff; for that whereas the said defendant on the 1st day of October, in the first year of the reign of His present Majesty King George the Fifth, at the parish of St. Helen, London, and within the jurisdiction of this Court, for and in consideration of divers sums of money before that time due and owing from the said defendant to the said plaintiff, at the parish aforesaid and within the jurisdiction aforesaid, and then being in arrear and unpaid, granted and agreed to pay to the said plaintiff the sum of thirty-five pounds ten shillings above demanded, where and when he, the said defendant, should be thereunto afterwards required: yet notwithstanding the said defendant, although often thereto requested, hath not yet paid to the plaintiff the said sum of thirty-five pounds ten shillings above demanded, or any part thereof, to the damage of the said plaintiff twenty shillings; and therefore he brings his suit, &c.

## THE UNIVERSITY COURTS.

Closely akin to the borough courts are the courts peculiar to the two ancient Universities of Oxford and Cambridge. These courts claim exclusive jurisdiction over the members of the University. This creates a curious exception to the jurisdiction of the High Court. If the defendant be a member of the University of Oxford resident within its limits, he must

[1] 50 & 51 Vict. c. xiii.

be sued in the Vice-Chancellor's Court, although the plaintiff be in no way connected with the University or resident within its limits, and although the cause of action did not arise within those limits.[1] In Cambridge the rule is the same, save that the privilege cannot be claimed if any person not a member of the University is a party.[2]

## The Sheriff's Court.

In ancient days the sheriff was a very important judicial officer. There was one for every county; he presided in the shire court, and exercised both civil and criminal jurisdiction. But owing to the rise of the King's Court, and in consequence of various statutes, the shire court was shorn of most of its jurisdiction and ceased to be of importance. Nevertheless, the sheriff—or rather his deputy, the under-sheriff—still holds a court where, with the aid of a jury of twelve persons, the following matters are dealt with:—

(a) Where a judgment creditor has sued out a writ of *elegit*, the sheriff, on receipt of such writ, must hold an inquisition for the purpose of ascertaining by means of his jury what lands the judgment debtor holds in the county and what is their value.

(b) Where, in an action for unliquidated damages or for the detention of goods, the plaintiff has signed interlocutory judgment on default of the defendant's appearance, and has taken out a writ of inquiry, the sheriff, by means of his jury, ascertains the amount of the damages or the value of the goods.

(c) Where lands over the value of £50 are compulsorily taken or injuriously affected under the Lands Clauses Act, 1845,[3] if the owner of the lands taken does not require an arbitrator, the compensation payable to him is to be ascertained by the sheriff and his jury.

An application for a new trial after the damages have been

[1] *Ginnett* v. *Whittingham* (1886), 16 Q. B. D. 761. The University of Oxford claims a similar exclusive privilege in criminal matters when any member of the University resident within its limits is either the prisoner or the prosecutor.

[2] 19 & 20 Vict. c. xvii., s. 18.

[3] 8 & 9 Vict. c. 18.

assessed by a jury before a sheriff must be made to the Court of Appeal.[1]

## The Coroner's Court.

This is a court of record, presided over by an officer who is next in rank to the sheriff, called the "coroner." A separate coroner is appointed for every county in England and Wales, and for every county borough or for every borough having a Court of quarter sessions. Whenever there is reasonable cause for suspecting that any person has died either a violent or unnatural death of which the cause is unknown, or that a person's death is due to some other cause than common illness, it is the duty of the coroner to hold a court in order to inquire by what means he came to his end. For this purpose he must summon a jury of not less than twelve nor more than twenty-three persons, who must by their verdict decide how the deceased came by his death. Such an inquiry is called an inquest or inquisition. The body must be viewed both by the coroner and by the jury summoned by him; and the coroner can issue a *subpœna* summoning before him any person who can, he believes, throw any light on the matter. He can attach such person for contempt of Court in the event of his disobedience. The coroner can also, by means of a *subpœna duces tecum*, compel anyone to produce any documents in his possession which are likely to be useful at the inquiry. He has also power to order a *post-mortem* examination of the body and the attendance of medical witnesses. The witnesses are examined on oath by the coroner, and it is his duty, in cases of suspected murder or manslaughter, to take down the deposition of each witness in writing. Such deposition is afterwards read over to the witness, and signed by him and the coroner. The finding of the jury is recorded in writing, and is attested by the signatures and seals of the jury, as well as of the coroner; the writing is then called an inquisition. If the jury has found any person guilty of murder or manslaughter, the coroner commits him for trial, and the

[1] *Radam & Co., Ltd.* v. *Leather*, [1892] 1 Q. B. 85.

accused may be arraigned on the inquisition without any presentment by a grand jury. As a fact, however, an independent investigation always takes place before a justice of the peace in the ordinary way, and both sets of depositions are sent up and dealt with at the assizes.

The coroner also holds inquests on persons executed, or dying within the precincts of a prison; and in cases of treasure trove.

## Inferior Courts not of Record.

Of the inferior civil Courts which are not Courts of record we have only space to deal with the Revising Barrister's Court and the Court of Petty Sessions.

### *Revising Barrister's Court.*

In this Court the lists of parliamentary voters, of burgesses, and of county electors are revised annually by a barrister appointed for that purpose.[1] He must be a barrister of seven years' standing.[2] Such barrister makes a circuit through a prescribed district and holds open Court at each of the polling places for the county, and at any other places within the county which he may think fit. His powers and duties as to such revision are regulated by the Parliamentary and Municipal Registration Act, 1878.[3] He has power to summon witnesses before him, to administer to them an oath and to order the production of documents. He can inflict a penalty in case of disobedience. At the hearing he determines the validity of all claims and objections laid before him. After the revision he delivers the revised lists to the clerk of the county council or to the town clerk of the borough. An appeal, in certain cases, lies from the revising barrister on a point of law, but not on a question of fact, or upon the admissibility or effect of any evidence adduced or admission made to establish any matter of fact only.

[1] County Electors Act, 1888 (51 Vict. c. 10), s. 6.
[2] Revising Barristers Act, 1873 (37 & 38 Vict. c. 53), s. 6.
[3] 41 & 42 Vict. c. 26.

Such an appeal is heard before a Divisional Court of the King's Bench Division: their judgment is final and conclusive, unless special leave is given to appeal to the Court of Appeal.

*The Court of Petty Sessions.*

A Court of petty sessions, though not a Court of record, is nevertheless a Court, even when it consists of only one justice,[1] and such a Court has power to deal with many matters of a purely civil nature, such as disputes concerning contracts between master and servant[2] or between members of friendly societies, or the assessment and division between the frontagers of the expenses incurred by a district council in making up a road. Where a plaintiff seeks to recover damages not exceeding £5 for injury done to his cattle by the defendant's dog, he can recover them summarily as a civil debt.[3] The justices have also jurisdiction over certain *quasi*-civil matters, such as affiliation orders.

These proceedings, whether civil or *quasi*-civil, are commenced by a "complaint," which is never made on oath, and need not be made in writing.[4] Only a summons can in the first instance be issued; though if the defendant fails to appear in obedience to the summons, a warrant for his arrest may then be issued, if the complainant substantiates his claim upon oath.[5] As in all other civil proceedings, the defendant can be compelled to give evidence on oath. If the case be decided in favour of the plaintiff, the justices make an "order" for payment of money; this merely creates a civil debt. It may be made payable by instalments; satisfactory security may be taken for its payment. Such order cannot be enforced by imprisonment, except in three cases:—

(a) Non-compliance with an affiliation order;[6]

(b) Disobedience to an order to do or abstain from an act;[7]

(c) Wilful non-payment, where the defendant has it in his power to pay.[8]

And even in these cases the punishment is a civil and not a criminal imprisonment.

[1] 52 & 53 Vict. c. 63, s. 13 (11); but see *Boulter* v. *Kent JJ.*, [1897] A. C. 556; *R.* v. *Sharman*, [1898] 1 Q. B. 578; and *R.* v. *Bowman*, [1898] 1 Q. B. 663.
[2] 38 & 39 Vict. c. 86, ss. 4—7, and see s. 9.
[3] 6 Edw. VII. c. 32, s. 1 (3).
[4] 11 & 12 Vict. c. 43, s. 8.
[5] *Ib.*, s. 2.
[6] 42 & 43 Vict. c. 49, s. 54.
[7] *Ib.*, s. 34.
[8] *Ib.*, s. 35.

Justices of the peace, moreover, have power to grant a judicial separation in cases that fall under two statutes:—

(i.) Under the Summary Jurisdiction (Married Women) Act, 1895,[1] a married woman can obtain a judicial separation in any one of the following cases—

(a) Where her husband has been summarily convicted of an aggravated assault upon her, or convicted upon indictment of any assault upon her for which he has been sentenced to a fine of more than £5 or imprisonment for more than two months.

(b) Where her husband has deserted her. To obtain relief on this ground the desertion need not be for any specified period.

(c) Where her husband has been guilty of persistent cruelty to her, or of wilful neglect to provide reasonable maintenance for her, and the wife has, owing to such cruelty or neglect, been driven to leave and live apart from him. In order to constitute cruelty "there must be danger to life, limb, or health, bodily or mentally, or a reasonable apprehension of it."[2] If the ground on which the wife seeks a judicial separation be wilful neglect to provide reasonable maintenance, the Court must be satisfied that her husband either "had actual earnings in his possession or that he had the capability of earning money."[3]

(ii. Under the Licensing Act, 1902,[4] where her husband is an "habitual drunkard," that is to say,[5] is "a person who, not being amenable to any jurisdiction in lunacy, is notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself, or to herself, or to others, or incapable of managing himself or herself, and his

[1] 58 & 59 Vict. c. 39, s. 4.
[2] *Per* Lopes and Lindley, L.JJ., in *Russell* v. *Russell*, [1895] P. at p. 322. *Per* Jeune, P., in *Earnshaw* v. *Earnshaw*, [1896] P. at p. 162.
[4] 2 Edw. VII. c. 28, s. 5 (1).
[5] 42 & 43 Vict. c. 19, s. 3 (b).

or her affairs." Under this Act, a married man can obtain a judicial separation from a wife who is an habitual drunkard within the above definition.[1]

Any order for judicial separation, which the magistrates may make under the above Acts, must state the grounds on which it is based, and may contain further provisions as to the custody of any children of the marriage under sixteen, as to the payment of a reasonable sum not exceeding £2 per week for alimony, and as to the payment of the Court fees and the costs of the parties.[2] Alimony may also be ordered without separation.

Justices of the peace are also authorised to assess the compensation payable to persons whose lands have been taken or injuriously affected by the acquisition of land by virtue of statutory powers when the amount claimed, if under the Lands Clauses Act, 1845,[3] does not exceed £50, or if under the Public Health Act, 1875,[4] does not exceed £20. They have also power whenever the tenancy of premises let at £20 a year or under has expired or been duly determined by notice to quit, to put the landlord in possession, provided certain notices have been given and other steps duly taken.[5] As to the duties of justices in connection with the stopping up or diversion of a highway, see *ante*, p. 9.

A Court of summary jurisdiction may also by the direction of the Board of Trade, or on the application of any person authorised by that Board to make a preliminary inquiry, hold a formal investigation into any shipping casualty.[6] It may be assisted at such inquiry by one or more assessors possessing nautical or engineering experience or other special skill or knowledge. These assessors will be appointed out of a list of persons approved for the purpose by the Secretary of

[1] 2 Edw. VII. c. 28, s. 5 (2).
[2] See 42 & 43 Vict. c. 19, s. 29; 2 Edw. VII. c. 28, s. 5 (2).
[3] When acquired by a railway company or local authority: 8 & 9 Vict. c. 18, ss. 3, 22, 24; 38 & 39 Vict. c. 55, s. 176.
[4] When injuriously affected by a local authority: 38 & 39 Vict. c. 55, ss. 52, 61, 150, 155, 181, 228, 308, 328.
[5] 59 Geo. III. c. 12, s. 24; 1 & 2 Vict. c. 74, s. 1; 62 & 63 Vict. c. 44, s. 5. As to deserted premises, see 11 Geo. II. c. 19, s. 16; 57 Geo. III. c. 52.
[6] Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 466.

State. Where a formal investigation involves or appears likely to involve any question as to the cancellation or suspension of the certificate of a master, mate or engineer, the Court must hold the investigation with the assistance of not less than two assessors having experience in the merchant service. The Court after hearing the case must make a report to the Board of Trade containing a full statement of the case and of the opinion of the Court thereon, accompanied by such report of, or extracts from, the evidence, and such observations as the Court think fit.[1]

[1] The Lord Chancellor may also appoint wreck commissioners, one of whom will, at the request of the Board of Trade, hold a formal investigation into any shipping casualty: 57 & 58 Vict. c. 60, ss. 466 (2), 477. Many other local inquiries are held by commissioners and inspectors by the direction of the Board of Trade and the Local Government Board. For instance, the Notices of Accidents Act, 1894 (57 & 58 Vict. c. 28), requires the proprietors of any railway, tramway, gasworks, canal, harbour, bridge, pier, or other public undertaking to give notice to the Board of Trade of any accident which causes either the death of any workman in their employ, or prevents his working as usual on any one of the next three working days; and the Board may thereupon direct an investigation to be held into the causes and the circumstances of such accident. The Notice of Accidents Act. 1906 (6 Edw. VII. c. 53), requires a similar notice to be given to the inspector of the district of any accident which has occurred in any mine or quarry.

# BOOK V.—PART II.

## PROCEDURE IN CRIMINAL CASES.

## Chapter VI.

### COMMENCEMENT OF CRIMINAL PROCEEDINGS.

Only the person, whose right has been violated, or who has sustained damage through another's breach or neglect of duty, or whose contract with another has been broken, can bring a civil action. But a crime is an offence against the community at large. Hence, in theory of law, any member of the community can prosecute a criminal.[1] Any person, however, who commences criminal proceedings maliciously, and without reasonable and probable cause, is liable to an action for malicious prosecution, if the proceedings fail;[2] and the fact that the prosecutor was not personally aggrieved or concerned in the matter will be some evidence of malice to go to the jury.

As a rule, however, whenever the person or property of any private individual is injured by a criminal act, the person injured prosecutes the offender. If the criminal act amounts to a felony, it is indeed his duty either to prosecute himself or to give information to the police in order that they may prosecute, if they think fit. But if the crime amounts only to a misdemeanour, there is no duty to prosecute, and no duty to inform the police. The person injured may take proceedings or not as he wishes.[3] The police may prosecute in any case which they deem of

[1] Justices can only convict summarily of assault on the complaint of a person not aggrieved, if the person aggrieved is unable to prosecute (24 & 25 Vict. c. 100, s. 42; *Pickering* v. *Willoughby*, [1907] 2 K. B. 296), not if he is merely unwilling to do so (*Nicholson* v. *Booth* (1888), 57 L. J. M. C. 43); but anyone may prosecute on indictment for an assault (*R.* v. *Gaunt* (1895), 73 L. T. 585).

[2] See *ante*, p. 541.

[3] See *ante*, p. 102.

sufficient importance, whether the person directly injured desires it or not; and it is seldom, if ever, that an action for malicious prosecution is successfully maintained against the police.

The Director of Public Prosecutions is authorised, under the superintendence of the Attorney-General, to institute or carry on criminal proceedings in any Court, and to give advice and assistance to chief officers of police, clerks to justices, and other persons concerned in any criminal proceeding.[1] He may intervene in any criminal proceeding actually commenced, and take the further conduct of the case out of the hands of the private prosecutor or the police. As a rule he only does so in cases of importance or difficulty, or in which special circumstances, or the refusal or failure of a person to proceed with a prosecution, render action on his part necessary to secure the due prosecution of an offender.

Another distinction between the right to prosecute for a crime and the right to bring a civil action is this—the High Court of Justice has jurisdiction over every act committed in any foreign country, by the law of which such act is either a tort or crime, provided it is also a tort by the law of England.[2] But at common law, no English Court had power to try any crime committed in a foreign country, and although jurisdiction has now been conferred on some of our Courts to try British subjects who have committed certain crimes abroad, no English Court can try an alien for any crime committed in a foreign country.[3]

Again, in civil actions, in the High Court of Justice at all events, it is immaterial in what part of England the tort or breach of contract which is sued on was committed. All local venues are now abolished in civil actions.[4] But it is otherwise in criminal cases. In the absence of special circumstances[5]

[1] 42 & 43 Vict. c. 22; 47 & 48 Vict. c. 58; 8 Edw. VII. c. 3.

[2] See *ante*, p. 993.

[3] See *ante*, p. 134, where the one exception is mentioned. If a man, who has committed in Great Britain a crime for which he could be sentenced to one year's imprisonment, flies to some other part of the King's dominions, he can be arrested there and brought back to Great Britain under the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69). He can also be brought back, if he has fled to a foreign country, provided reciprocal treaties have been made under the Extradition Acts, 1870 and 1873 (33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60), between that foreign country and Great Britain.

[4] Order XXXVI., r. 1.

[5] An indictment found in the country may for special reasons be brought up by writ of *certiorari* for trial in the King's Bench Division or in the Central Criminal Court: see *ante*, pp. 986, 987.

every crime must be tried in the county in which it was committed. So, if a crime be committed within a borough in which a Court of quarter sessions is held, that crime must, in the absence of special circumstances, be tried within the borough, unless it is of so serious a character that it must be sent to the assizes. In other words, all criminal jurisdiction still is local.

In certain cases, however, a prisoner may be tried in another county to that in which the crime was committed. Thus for offences against the Customs Acts he may be tried in any county.[1] For forgery[2] or bigamy[3] he may be tried either in the county where the crime was committed or in the county where he was arrested or is in custody. If the offence was committed on any coach, vessel, &c., employed on any journey, the accused may be tried in any county through which such coach or vessel passed.[4] Again, where the offence was begun in one county and completed in another, or was committed on the boundary of two or more counties, or within ~~one~~ five hundred yards of the boundary, he may be tried in either of these counties.[5]

Moreover, to all civil rights of action,[6] a period of limitation has been assigned within which the action must be brought. The contrary is the rule in criminal cases. At common law, lapse of time for any period, however long, was no bar to a prosecution; the maxim was, *Nullum tempus occurrit regi*. By statute, however, certain exceptions have been made to this rule.

Thus, in prosecutions for treason committed within Great Britain, the bill must be found by the Grand Jury within three years after the offence.[7] There is an express exception where the charge is for "designing, endeavouring, or attempting any assassination of the King by poison or otherwise."[8] Proceedings under the Riot Act must be commenced within one year,[9] and under the Customs Acts within three years.[10]

In prosecutions for blasphemy, information must be laid within four days of the commission of the offence, and prosecution must follow within three months after the information.[11]

[1] 39 & 40 Vict. c. 36, s. 258.
[2] 24 & 25 Vict. c. 98, s. 41.
[3] 24 & 25 Vict. c. 100, s. 57.
[4] 7 Geo. IV. c. 64, s. 13.
[5] *Ib.*, s. 12.
[6] There is one exception: see *post*, p. 1123.
[7] 7 & 8 Will. III. c. 3, s. 5 (for England, Wales and Berwick-on-Tweed); 7 Anne, c. 21 (for Scotland), s. 1.
[8] 7 & 8 Will. III. c. 3, s. 6.
[9] 1 Geo. I. st. 2, c. 5, s. 8.
[10] 39 & 40 Vict. c. 36, s. 257.
[11] 9 & 10 Will. III. c. 35, s. 2. As to profane swearing, see 19 Geo. II. c. 21, s. 12.

Under the Unlawful Drilling Act, 1820,[1] the period of limitation is six months; under the Night Poaching Act, 1828,[2] twelve months; under the Corrupt and Illegal Practices Acts,[3] twelve months after the offence or three months after the close of an inquiry (not exceeding two years altogether); under the Births and Deaths Registration Act, 1874,[4] three years; under the Criminal Law Amendment Act, 1885,[5] in respect of offences against a girl over thirteen and under sixteen years of age, three months; under the Merchandise Marks Act, 1887,[6] three years after the offence or one year after the discovery of the offence by the prosecutor, whichever shall first happen; for the felony of unduly solemnising a marriage,[7] and for the offences under the Marriage Act, 1836,[8] three years; and for perjury under the Marriage Act, 1840,[9] eighteen months. And lastly, charges against officials for neglecting or exceeding their duty must be brought within six months after the offence was committed.[10] Unless the contrary be expressly provided, the indictment must be found or the criminal information issued before the expiration of the period of limitation.

### *Proceedings before Magistrates.*

Criminal proceedings are usually commenced by an application for either a summons or a warrant. Such application is made to a magistrate for the county or borough, in which the crime was committed, by a private prosecutor or by a police officer acting on his own motion. A summons is merely a written order by a magistrate, bidding the accused appear before him to answer the charge stated in the summons on a day named, which is called the "return day." The prosecutor can usually obtain such a summons by making a verbal complaint to the magistrate's clerk. A warrant, on the other hand, is a written order from the magistrate to an officer

[1] 60 Geo. III. & 1 Geo. IV. c. 1, s. 7.
[2] 9 Geo. IV. c. 69, s. 4.
[3] 46 & 47 Vict. c. 51, s. 51 (Parliament); 47 & 48 Vict. c. 70, s. 30 (Borough Councils); 47 & 48 Vict. c. 70, ss. 35, 36 (City of London); 51 & 52 Vict. c. 41, s. 75 (County Councils); 56 & 57 Vict. c. 73, s. 48 (District and Parish Councils and Boards of Guardians); and 62 & 63 Vict. c. 14 (London Borough Councils). Under these Acts the commencement of a prosecution is the service of the process and not its issue, unless the accused deliberately evades service.
[4] 37 & 38 Vict. c. 88, s. 46.
[5] 48 & 49 Vict. c. 69, s. 5. Commencement of proceedings for rape is enough: *R.* v. *West*, [1898] 1 Q. B. 174.
[6] 50 & 51 Vict. c. 28, s. 15.
[7] 4 Geo. IV. c. 76, s. 21.
[8] 6 & 7 Will. IV. c. 85, s. 41.
[9] 3 & 4 Vict. c. 72, s. 4.
[10] Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), s. 1 (*a*). There is also the general limitation of six months for offences triable summarily; see *post*, p. 1045. See also the Children Act, 1908 (8 Edw. VII. c. 67), s. 32.

of police, bidding him arrest the accused, and this can be obtained by the prosecutor laying an "information" in writing before the magistrate, and swearing to the truth of the statements contained in it.

If a summons be granted and the accused does not appear on the return day, the magistrate may issue a warrant for his apprehension.

Thus in one way or another, either by summons or warrant, the accused is brought before a Court of petty sessions. That Court must then in the first place consider whether the case is one which—

(i.) ought to be disposed of summarily (*i.e.*, then and there without a jury), or

(ii.) ought to be sent for trial by a jury at either quarter sessions or assizes.

This question is in most cases determined as a matter of law by the nature of the offence with which the accused is charged. Every treason, felony and misdemeanour is indictable; every other criminal offence may be disposed of summarily by justices of the peace. At common law an indictable offence could only be tried by a jury; a justice of the peace could in no case dispose of it summarily; the accused was entitled to a verdict of his peers. But to this rule important exceptions have been made by recent legislation. Acts, which were already indictable misdemeanours at common law, have been made by statute offences punishable summarily by justices; nevertheless they still remain indictable misdemeanours, and may in a proper case be so treated, though it is more usual to follow the procedure prescribed by the statute.

It is in some cases difficult to decide in the first instance whether a particular act is punishable on indictment or summarily. Where the act may properly be included in either category, it is generally treated as triable summarily. Again, it may depend upon the evidence. Thus, in some cases it is expressly enacted that a certain offence shall be tried summarily if the accused has never been previously convicted of

that offence, but shall be indicted if it be the prisoner's second or third offence. The Court, therefore, cannot tell whether it has jurisdiction or not without inquiring into the prisoner's antecedents. Again, if a man damages the front door of a dwelling-house with a chisel, his act may amount to an attempt to commit housebreaking or burglary, if it were done with a felonious intent to enter the house and steal the goods therein. But it will be only a malicious injury to property if done wantonly and out of pure mischief, and this offence is triable summarily if the damage done be less than £5.

Moreover, in some cases, which are *primâ facie* non-indictable, the prisoner can now elect to be tried by a jury on an indictment;[1] and in other cases, which are *primâ facie* triable only on indictment, the magistrates may, if they think proper, offer the accused the alternative of being tried summarily.

Thus all assaults are indictable; nevertheless, justices of the peace can now try summarily any assault which is not so grave as to amount to a felony, provided the person assaulted be himself the prosecutor.[2] On the other hand, any person who is charged with an offence for which on summary conviction he could be sentenced to imprisonment for more than three months (except an assault of a non-felonious character) can at the hearing, but before the charge has been gone into, claim to be tried by a jury, and then the case will be dealt with on indictment. Hence, when any person appears before justices charged with such an offence, they must—before taking any evidence—inform him of his right to be tried by a jury,[3] telling him at the same time, if they think fit, at which quarter sessions or assizes he will be tried. They must also adopt this course where the liability of the accused to three months' imprisonment only appears incidentally in the course of summary proceedings.[4]

Again, justices of the peace are now authorised to deal summarily with children under twelve years of age[5] who are accused of indictable offences other than homicide, unless the parent or guardian of the child objects. A Court of petty sessions at any time during the hearing of such a case, if satisfied by the evidence that it is expedient to deal with it summarily,

[1] This is so, even where the statute which creates the offence expressly enacts that it "shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts": *R.* v. *Goldberg*, [1904] 2 K. B. 866.

[2] 24 & 25 Vict. c. 100, s. 42; and see *ante*, pp. 314, 315.

[3] Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 17.

[4] *R.* v. *Beesby and others*, [1909] 1 K. B. 849.

[5] The change of procedure does not, of course, render punishable any child who is not above the age of seven years, nor of sufficient capacity to commit crime.

may cause the charge to be reduced into writing and read to the parent or guardian of the child, and then ask the parent or guardian, "Do you desire the child to be tried by a jury, and object to the case being dealt with summarily?" The justices, whenever they think it desirable, explain to the parent or guardian the meaning of the phrase, "the case being dealt with summarily," and tell him at what Court—whether assizes or sessions—the child will be tried, if the case is not tried summarily. If the parent raises no objection and the case is disposed of summarily, the justices can only inflict one month's imprisonment or a fine of 40*s*.

Again, when a young person[1] is charged with any indictable offence other than homicide, the justices have a similar power, but only if the "young person" consents.

An "adult" (*i.e.*, a person over sixteen years of age) may also in certain offences elect to be dealt with summarily by the magistrates in preference to being sent to the assizes.[2] The offences referred to are:—

(a) Simple larceny.
(b) Offences punishable by statute as simple larceny.
(c) Stealing from the person.
(d) Larceny or embezzlement as a clerk or servant.
(e) Receiving stolen goods.
(f) Aiding or abetting the commission of any of the above offences.
(g) Obtaining money or goods by false pretences.
(h) Setting fire to any wood, heath, fern, &c.

Provided the value of the whole property which is the subject-matter of any of the above offences does not exceed forty shillings.

(i) Indecent assault on a boy or girl under sixteen.[3]

The maximum punishment that the magistrates can inflict in cases (a) to (h) is imprisonment for three months with or without hard labour, or instead a fine up to £20. In case (i) imprisonment for six months can be given.

Whatever be the value of the property concerned, the adult can elect to be dealt with summarily when

(a) the charge is one of an attempt to commit one of the above offences; or,
(b) the adult pleads guilty to one of the above offences. In this case the maximum punishment is imprisonment for six months with or without hard labour.

But no one can be dealt with summarily for any of the above offences if, owing to a previous conviction on indictment, he would be liable to be sent to penal servitude on conviction at either the assizes or quarter sessions.[4]

[1] For the purposes of the Summary Jurisdiction Act, 1879, a child is defined to be a person who, in the opinion of the Court before whom he is brought, is under the age of twelve years. A young person is one who, in the opinion of the Court, is over twelve and under sixteen years of age.

[2] 42 & 43 Vict. c. 49, s. 14. The offences referred to in the text are specified in the second column of the First Schedule to the Summary Jurisdiction Acts, 1879 and 1899 (42 & 43 Vict. c. 49, and 62 & 63 Vict. c. 22).

[3] This offence is expressly included in the offences set out in the First Schedule of the Summary Jurisdiction Act, 1879, by s. 128 of the Children Act, 1908 (8 Edw. VII. c. 67).

[4] 42 & 43 Vict. c. 49, s. 14.

The magistrates can now, when dealing summarily with indictable offences, order the accused on conviction to pay the costs of the prosecution.[1]

A justice of the peace has a valuable power which he can exercise in all cases where property has been obtained by any crime punishable under the Larceny Act, 1861.[2] He can issue a search warrant authorising certain persons to enter a building to search for stolen goods, and to seize them if found. The warrant must name or describe the persons authorised to search, the building to be searched, and goods for which search is to be made. The officer must take the warrant with him; he should also take with him a person who can identify the stolen property. He should demand admission before exercising his right to enter by force.

Every prisoner who is brought up for trial at either the assizes or quarter sessions is tried on an indictment and by a jury.[3] In the case of such a prisoner the duty of the committing magistrate is merely to prepare the case for the subsequent trial. This ancillary jurisdiction can be exercised by one justice of the peace sitting alone. The procedure is regulated mainly by the Indictable Offences Act, 1848.[4] But when the prisoner is to be dealt with summarily, the Court must be differently constituted; it must then, as a rule, consist of at least two justices.[5] In certain cities and large towns, however, a stipendiary magistrate or a police magistrate has been appointed, who has all the powers of a Court composed of two justices; and so has an alderman of the City of London. The procedure of such a Court is regulated by the Summary Jurisdiction Acts, 1848, 1879, and 1899.[6]

### *Summary Jurisdiction of Justices.*

Besides the indictable offences with which justices of the peace have now power to deal summarily, they have also

[1] 8 Edw. VII. c. 15, s. 6.

[2] 24 & 25 Vict. c. 96, s. 103. He can do so too in the cases of offences committed in the colonies by persons who have fled to England with the property taken: 44 & 45 Vict. c. 69, s. 24. In certain cases specified in s. 16 of the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), a chief officer of police may also give authority in writing to any police constable to enter any premises, and to search for and seize any property which he believes to have been stolen.

[3] There is one exception: an "incorrigible rogue" is tried on an indictment, but without a jury.

[4] 11 & 12 Vict. c. 42.

[5] There are certain statutes which authorise a single justice to form a Court of summary jurisdiction; but when sitting thus alone he cannot inflict more than fourteen days' imprisonment or a fine of more than twenty shillings: 42 & 43 Vict. c. 49, s. 20 (7).

[6] 11 & 12 Vict. c. 43; 42 & 43 Vict. c. 49; 62 & 63 Vict. c. 22.

jurisdiction to dispose of an enormous number of petty criminal offences which are not indictable (such as adulteration of food, breaches of by-laws, offences against the Licensing Acts, cruelty to animals, &c.). It is practically impossible in this work to give even an outline of the very varied matters which can now be dealt with summarily by justices. Nearly every year some new statute makes additions to the list. Suffice it to say that with regard to all that are of a criminal character—

(i.) the proceedings must be commenced within six months from the date of the alleged offence;

(ii.) the jurisdiction of the justices is ousted if a *bonâ-fide* claim of right be raised by the defendant, provided the existence of the right claimed is possible in law and would justify the act complained of;[1]

(iii.) if the justices find the accused guilty, the maximum punishment which they can inflict is, as a rule, six months' imprisonment with hard labour;[2] they can never impose penal servitude;

(iv.) the justices can also impose a fine, which in some cases may be as much as £20;[3] if the fine be not paid, the defaulter may in most cases be imprisoned for a term varying according to a graduated scale; in other cases the payment of the fine may be enforced by distraining his goods.

Neither the complainant nor the defendant can make more than one speech. The majority of the justices present decides whether the defendant is guilty or not. The chairman has no casting vote. Hence, if the votes be equal, either the matter must be adjourned for a re-hearing or the accused must be discharged. If the Court thinks that the offence,

[1] *Scott* v. *Baring* (1895), 64 L. J. M. C. 200; *Burton* v. *Hudson* (1909), 101 L. T. 233. So, too, the jurisdiction of the justices to try any case of assault will be ousted, if the assault arose out of any claim to land, &c.: 24 & 25 Vict. c. 100, s. 46.

[2] There are two or three cases in which two justices in petty sessions can sentence a man to twelve months' imprisonment, *e.g.*, where a place is kept for unlawful gaming; where a ticket-of-leave man or person under police supervision omits to report himself to the police, &c.; see 17 & 18 Vict. c. 38, s. 4; 34 & 35 Vict. c. 112, ss. 5, 7, 8; 54 & 55 Vict. c. 69, s. 4.

[3] In seven cases it may be as much as £50; in two cases as much as £100; in one case (viz., keeping a place for unlawful gaming), £500; see Atkinson's Magistrates' Practice 6th ed., at pp. lv.—lxxxvi.

though proved, is of a trifling nature, it can, without proceeding to conviction, dismiss the information, or it may convict and bind over the accused to be of good behaviour; in either case it can order the accused to pay the prosecutor damages not exceeding forty shillings.[1]

From a conviction by a Court of summary jurisdiction an appeal lies to quarter sessions. The decision may also be reviewed by the King's Bench Division.

(i.) In most non-indictable offences an appeal is allowed to the defendant on any question of fact—and sometimes even to the prosecution; and in particular to any person who, not having admitted his guilt, has been sentenced to imprisonment without the option of a fine. This appeal lies to quarter sessions, where the whole case will be heard over again, and new witnesses may be called; it is heard by the justices of quarter sessions or by a recorder without a jury.

(ii.) The decision of a Court of summary jurisdiction can also be reviewed in the King's Bench Division. This Court can issue a writ of *certiorari* to bring up a conviction, and quash it, if necessary, for some mistake in law. It can also decide points of law, which are stated in cases submitted to it by either party.

*Cases which are to be Tried on Indictment.*

When a case is to be sent for trial by a jury, the duties of a justice of the peace are very different from those which he discharges when he tries a case summarily. He has no longer to decide whether the accused is or is not guilty of the offence with which he is charged. He has merely to determine whether there is such a *primâ facie* case against the accused as to warrant his being put upon his trial; if there is, then he has one further duty—that of seeing that all necessary steps are taken to duly prepare the case for trial. The accused is either brought before him in custody under a warrant, or appears in obedience to a summons; the presence of the accused is essential. The justice can also compel the

[1] 42 & 43 Vict. c. 49, s. 16.

attendance before him of anyone "likely to give material evidence,"[1] by issuing a summons, or even, in case of need, a warrant.

The prosecutor then states his case, and calls his witnesses, who are examined-in-chief, cross-examined, and re-examined. The clerk to the justices writes down the gist of the statements made in the box. This record of the sworn evidence of each witness is called his "deposition."

At the close of the evidence for the prosecution the justice must ask the accused if he wishes to make a statement. He must also tell the accused that anything he may say will be taken down in writing, and may be given in evidence against him at his trial; and that he has nothing to hope or fear from any promise of favour or any threat which may have been held out to him to make any admission or confession of his guilt.[2] The accused thereupon sometimes replies merely "I reserve my defence,"[3] or "I have nothing to say;" sometimes he makes a detailed statement from the dock. He may, however, prefer to go into the witness-box and give evidence on oath, when he will be liable to be cross-examined by the prosecutor or his advocate. He may also, if he thinks fit, call witnesses in his favour. The case is sometimes remanded to enable him to procure the attendance of such witnesses. The prisoner's statement, his evidence, if he has elected to go into the box, and the evidence of his witnesses, if any, are also taken down by the clerk to the justices.

The justice must then determine whether there is a case to be submitted to a jury; if so, he must commit the prisoner for trial either at the assizes or quarter sessions. He cannot discharge him unless he thinks there is no probability of any jury convicting him; and even if he is of this opinion, the prosecutor can nevertheless insist upon the prisoner being committed for trial; if he does so, he must be bound over to prosecute and will have to pay the costs, if the prisoner is eventually acquitted. In either case the clerk reads over to

[1] 11 & 12 Vict. c. 42, s. 16.
[2] *Ib.*, s. 18.
[3] But see *post*, p. 1049.

each witness the notes of his evidence. This gives the witness an opportunity of correcting or adding to them. The witness then signs the deposition as being correct. The prisoner also signs his statement. The depositions, the prisoner's statement, the exhibits and the sworn information, if any, are then remitted to the clerk of the court in which the prisoner is to be tried.[1]

The prosecutor is bound over to attend and prosecute, and the witnesses to attend and give evidence at the trial—each in his own recognizance.[2] If any witness refuses to be bound over, he can be detained in prison and taken against his will to the place of trial to give evidence.[3]

A prisoner, who has been committed for trial, will be detained in prison, unless the justice thinks fit to let him "out on bail." But during such detention he is not treated as a convict; he is placed with other prisoners awaiting trial. Bail is never allowed in cases of treason; in felonies and the graver misdemeanours,[4] the justice has a discretion to admit the prisoner to bail or not; in the lesser misdemeanours he must let the prisoner out on bail, if sufficient bail is offered.

It is the duty of the justices to secure, so far as it lies in their power, the attendance of the prisoner at the trial, and this is the consideration which will govern the exercise of their discretion in granting bail. The amount of the security which they will demand from the prisoner and his bail will therefore depend upon the probability or possibility of his wishing to escape trial; and this again will depend on the nature of the charge, on the strength of the case against him, on his character, his wealth, and other surrounding circumstances. If a man who is out on bail agree with his bail to indemnify them against the pecuniary loss which they will sustain through his not appearing at the trial, he and his bail are all guilty of an indictable conspiracy.[5]

[1] *I.e.*, to the clerk of assize, if the prisoner is committed to the assizes; to the clerk of the peace for the county, if the prisoner is committed to county quarter sessions; to the clerk of the peace for the borough, if the prisoner is committed to borough quarter sessions.

[2] A "recognizance" is a contract executed or acknowledged before a court of record (or an officer authorised to take it) by a person, who thereby admits his indebtedness to the Crown in a specified sum, such indebtedness to cease upon his doing the act enjoined by the Court. Entering into such a recognizance is called "being bound over" to do the act enjoined.

[3] 11 & 12 Vict. c. 42, s. 20.

[4] See 38 & 39 Vict. c. 66. The misdemeanours referred to are perjury, attempts to commit felony, concealment of birth, false pretences, and those offences for which the county paid the costs of the prosecution.

[5] *R.* v. *Porter*, [1910] 1 K. B. 369.

Another application is frequently made to the justices at this stage of the proceedings. The prisoner asks for "legal aid" under the Poor Prisoners' Defence Act, 1903.[1] To entitle him to such aid a defence must be disclosed in the evidence given at the hearing or in the statement made by him in answer to the statutory caution, and the justices must be satisfied that the prisoner's means are insufficient to provide the legal aid which it is desirable, in the interests of justice, that he should have in the preparation and conduct of his defence.[2]

If the application is granted, the justices certify that he ought to have such legal aid, and solicitor and counsel are assigned to him. He is also allowed a copy of the depositions.[3] The expenses of such defence are paid out of public funds in the same way as the costs of his prosecution.[4]

A poor prisoner, whether he applied to the justices or not, may make the same application[5] to the judge[6] who is to try him, at any time after the latter has read the depositions.

Under this Act, therefore, any prisoner without means, who can show a fair defence, will be defended at the expense of the public.

In point of fact, almost every criminal offender, who appears for trial at the assizes or quarter sessions, is tried on an indictment, and has in the first instance been brought before a justice of the peace who has committed him for trial. A grand jury can—but in practice never does—make a presentment of an offence within its own knowledge. Moreover, in most cases a prosecutor has still the right, which he possessed at common law, to prefer a "voluntary bill" to the grand jury without any preliminary investigation before a justice of the peace, and even without any notice to the accused. Such a course, however, is very rarely taken, as it is manifestly unfair to present to the grand jury a bill of indictment against a man behind his back.

Such a mode of proceeding has been expressly forbidden in the following cases:—

(a) By the Vexatious Indictments Act, 1859,[7] where the charge is one of perjury and subornation of perjury,[8] conspiracy, obtaining money or goods

[1] 3 Edw. VII. c. 38; and see the Rules set out *post*, at end of Appendix.
[2] S. 1 (1).
[3] See *post*, p. 1052.
[4] S. 2 (1).
[5] S. 1 (1).
[6] Judge means "judge of assize, or chairman of quarter sessions, or recorder, or the deputy of either of the two latter:"; ss. 1 (1) and 3.
[7] 22 & 23 Vict. c. 17, s. 1.
[8] Unless the judge before whom the alleged perjury was committed has directed a prosecution.

by false pretences, keeping a gaming or disorderly house, or indecent assault.

(b) Offences against the Debtors Act, 1869.[1]
(c) In all cases of libel.[2]
(d) Offences against the Criminal Law Amendment Act, 1885.[3]
(e) Offences against the Merchandise Marks Act, 1887.[4]
(f) Offences against the Prevention of Corruption Act, 1906.[5]
(g) Offences against the Punishment of Incest Act, 1908.[6]
(h) Offences against the Children Act, 1908, Part II.[7]

The procedure when the magistrates are conducting a preliminary investigation necessarily differs in many respects from the procedure at a summary trial.

(i.) The main distinction is, of course, that in the latter case it is the duty of the justices to decide whether the person charged is guilty or not guilty, and the proceedings terminate with either a conviction or an acquittal. In the former case the duty of the justices is merely to ascertain whether there is or is not a case made out against the accused proper to be tried elsewhere, and the proceedings end either with a discharge or a committal for trial.

(ii.) In the second place, one justice sitting alone can conduct a magisterial investigation, whereas two justices at least must, as a rule, be present when an offence is being tried summarily.[8]

(iii.) Again, a magisterial investigation can be held at any time, and at any place within the justices' jurisdiction, and the justices, apparently, have power to exclude the public if they think fit ;[9] whereas, when disposing of a case summarily they sit at regular intervals in a stated place, and the building in which they sit is then an open and public court.[10]

(iv.) Moreover, when conducting a magisterial investigation, the accused must be present ; whereas, when the justices are

[1] 32 & 33 Vict. c. 62, s. 18.
[2] 44 & 45 Vict. c. 60, s. 6.
[3] 48 & 49 Vict. c. 69, s. 17.
[4] 50 & 51 Vict. c. 28, s. 13.
[5] 6 Edw. VII. c. 34, s. 2.
[6] 8 Edw. VII. c. 45, s. 4.
[7] 8 Edw. VII. c. 67, s. 35.
[8] See *ante*, p. 1044.
[9] Indictable Offences Act, 1848 (11 & 12 Vict. c. 42), s. 19.
[10] Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), s. 12.

trying a case summarily, they can, if they think fit, dispose of it in the absence of the accused.

(v.) Lastly, when the justices are preparing a case for trial elsewhere, the evidence given before them must be written down by their clerk in the form of a deposition which is subsequently read over to and signed by the witness, and the justice may bind over the witness to appear and give evidence when and wherever called upon to do so. But when the justices are about to dispose of a case themselves, the evidence of the witnesses need not, as a rule, be taken down in writing. It is true that the clerk to the justices usually makes a note of the evidence given; but this note is of no statutory authority, it is merely his private memorandum.

*Depositions.*

It is difficult to over-estimate the value and importance of the depositions taken before justices under the Indictable Offences Act, 1848.[1] They are an official record of the oral evidence given. They inform the prisoner of the facts by which the charge made against him will be sought to be established, and so enable him to prepare his defence. They enable the clerk of indictments to prepare the indictment, the judge, recorder, or chairman to charge the grand jury, and to decide whether the prisoner is entitled to have legal aid assigned to him;[2] and they serve to check or contradict, if necessary, the evidence which the witnesses give at the actual trial.

As, however, depositions are only secondary evidence, they cannot be read at the trial if the witness can be called. If he is dead or too ill to travel, or has become insane or is kept out of the way by the prisoner or his friends,[3] they will become admissible and can then be read to the jury as evidence of the facts which they record. The person tendering such evidence must prove that the witness is unable to attend for one of the reasons just mentioned, that

[1] 11 & 12 Vict. c. 42.
[2] Poor Prisoners' Defence Act, 1903 (3 Edw. VII. c. 38), s. 1 (1).
[3] See Nowell on Evidence, 9th ed., pp. 326—337.

the depositions purport to be signed by the witness and also by the justice by or before whom they were taken, and that the prisoner was present at the time and had an opportunity, either personally or by his advocate, of cross-examining the witness in question.

The prisoner is entitled to inspect the depositions without fee,[1] and, after he has been committed, he may obtain a copy of them at any time before the first day of the sessions or assizes on payment of 1½d. for each folio of 90 words.[2] In cases in which legal aid is granted under the Poor Prisoners' Defence Act, 1903,[3] the prisoner has a right to a copy without paying any fee therefor.

The prisoner's statement before the justices is usually treated as part of the depositions, though there is authority for saying that it is not.[4] If this be correct, the prisoner is strictly not entitled to a copy of it; but it is submitted, however, that, since the passing of the Indictable Offences Act, 1848,[5] the statement has become a part of the depositions for all purposes.

[1] 6 & 7 Will. IV. c. 114, s. 4.
[2] 11 & 12 Vict. c. 42, s. 27. The prosecution pay 4*d.* per folio of 72 words.
[3] 3 Edw. VII. c. 38, s. 1; and see *ante*, p. 1049.
[4] *R.* v. *Aylett* (1838), 8 C. & P. 669.
[5] 11 & 12 Vict. c. 42.

## Chapter VII.

### INDICTMENTS AND CRIMINAL INFORMATIONS.

Prosecution by indictment is the most usual method of bringing to justice persons accused of crime. An indictment is an accusation in writing preferred to a grand jury charging a definite person with the commission of a definite crime. It may be presented to a grand jury at any length of time after the commission of the offence, unless a period of limitation has been fixed by some statute. It is almost invariably written on parchment. Its full name is a "bill of indictment;" but when preferred to a grand jury it is generally called a bill; when the grand jury has presented it on oath to the Court as a "true bill," it is called an indictment. "For it is not an indictment until a true bill is found by the grand jury."[1]

An indictment is usually drafted by an officer of the court to which the prisoner has been committed for trial. The justices, as we have seen, always forward the depositions to the clerk of that court; and he uses them for the purpose of preparing the indictment. In cases of difficulty he often instructs counsel to do this. In Treasury cases the counsel for the Treasury, or some official in the Treasury office, draws the indictment. In a private prosecution the counsel retained by the prosecutor often draws it. In all ordinary cases that will be tried at the assizes, the indictment is drawn by an officer of the circuit, called the clerk of indictments. Precedents of indictments will be found in the Appendix.

The office of an indictment is to define the precise charge which the prisoner is called upon to answer, and of which the petty jury must either acquit or convict him. It must therefore allege every fact necessary to constitute the criminal charge which it prefers. If, in order to establish the charge, it is necessary to show that certain acts have been committed, it is necessary to allege that those acts were in fact committed. If it is necessary to show that those acts, when they

[1] *Per* Lord Alverstone, C.J., in *R.* v. *Barraclough*, [1906] 1 K. B. at p. 211.

were committed, were done with a particular intent, that intent must be expressly averred. If it is necessary—as it sometimes is—in order to establish the charge, that the existence of a certain fact should be negatived, that negative must be alleged.

In some cases certain "words of art" are necessary to the validity of an indictment. Thus in an indictment for murder, the words "feloniously and of malice aforethought did kill and murder" must be used; in an indictment for burglary, the word "burglariously" must appear; in any indictment for felony, the word "feloniously" must be inserted. But in an indictment for a misdemeanour less strictness is required; thus in an indictment for libel the word "maliciously" may be omitted if the word "unlawfully" be present.[1]

But an indictment should never set out the evidence by which it is sought to prove the charge; nor should it allege any matter which need not be proved at the trial,[2] though the presence of any such unnecessary matter will not render it bad. Mere surplusage will not vitiate an indictment.[3] The names of the witnesses for the prosecution are written on the back of each indictment.

The indictment consists of—
(i.) the Venue,
(ii.) the Presentment,
(iii.) the Statement,
(iv.) the Conclusion.

The venue and the presentment together make up the commencement or caption. The venue is the statement in the margin of the indictment of the county or district over which the Court has jurisdiction, and from which the jurors who are to try the case are drawn; for instance, "City of Winchester, to wit" or "County of Somerset, to wit." The general rule is that an offence can only be tried by the Court within whose jurisdiction it was committed.[4] The presentment merely consists of the words, "The jurors of our Lord the King upon their oath present . . ." If there be more than one count, it will run in the later counts, "And the jurors aforesaid upon their oath aforesaid do further present . . ."

The statement is the most important part of the indictment. It must state, with as much certainty as possible, the names of the prisoner and of the person injured, and the facts and intent that are necessary elements of

[1] *R.* v. *Munslow*, [1895] 1 Q. B. 758, 762.
[2] 14 & 15 Vict. c. 100, s. 24.
[3] *R.* v. *Parker* (1870), L. R. 1 C. C. R. 225; *R.* v. *Newboult* (1872), *ib.*, 344.
[4] But there are now some exceptions; see *ante*, p. 1039.

the crime charged. Absolute correctness in every detail is not essential; for the Court may amend mere misdescriptions, the alteration of which does not affect the nature or quality of the offence charged, or prejudice the trial of the prisoner.[1] But if any necessary ingredient be altogether omitted, the indictment is bad and the Court has no power to amend it.

The conclusion of indictments for common law offences is, "Against the peace of our Lord the King, his crown and dignity;" and for statutory offences, "against the form of the statute in such case made and provided and against the peace of our Lord the King, his crown and dignity." But a conclusion is no longer essential to the validity of an indictment.[2]

If a prisoner has committed more than one crime, each of them should, as a general rule, be stated in a separate indictment. In some cases, however, a prisoner may be charged in the same indictment with two or more offences. But, even in these cases, each charge must be set out in a separate paragraph or "count;" and each count must contain a complete and distinct charge of crime. And where offences are stated in the alternative, each alternative charge should form the subject-matter of a separate count.

In this connection great importance is attached to the antiquated distinction between a felony and a misdemeanour. The rules on the subject may be shortly stated as follows:—

1. Each distinct felony should be charged in a separate indictment; or the judge at the trial will probably call upon the prosecutor to elect on which charge he will proceed. But to this rule there are two exceptions:

(i.) An indictment for larceny may contain a second count for receiving.[3]

(ii.) In cases of larceny and embezzlement the indictment may charge three several offences, provided that they be all committed against the same person and within six months. The indictment must expressly state that the offences took place within the space of six months.[4]

2. Several counts for felony may be inserted in the same indictment, if they are only different descriptions of the same occurrence—different legal aspects of the same criminal act. Thus if A. assaults and robs B., A. can be charged in different counts of the same indictment with

(i.) robbery from the person,

(ii.) assault with intent to rob,

(iii.) larceny from the person, and

(iv.) simple larceny.

[1] 14 & 15 Vict. c. 100, s. 1; *R.* v. *Murray and others*, [1906] 2 K. B. 385.
[2] 14 & 15 Vict. c. 100, s. 24.
[3] See the indictment in the Appendix, No. 13.
[4] *Ib.*, No. 7 (Embezzlement).

If A. violently assaults B. and attempts to rob him, he may be charged in different counts of the same indictment with

(i.) attempt to rob,

(ii.) causing grievous bodily harm with intent to maim,

(iii.) causing grievous bodily harm with intent to disable, &c.[1]

3. A count for felony and a count for misdemeanour cannot be placed in the same indictment, for the jury is sworn differently in the two cases. Thus in neither of the two preceding instances could a count for a common assault, or for unlawfully wounding, be added ; for both these are misdemeanours.

4. Any number of counts for misdemeanours by themselves may be included in the same indictment ; though, where the result of so doing is obviously inconvenient at the trial or obviously unfair to the prisoner, the judge may compel the prosecutor to elect on which charges he will proceed and which abandon.

Nearly every criminal offender who appears at the assizes or quarter sessions is tried on an indictment. Cases do nevertheless occur, in which no indictment has been laid before a grand jury. Thus a prisoner may be committed for trial by the coroner in pursuance of the verdict of his jury and tried upon an inquisition,[2] although a person so committed is generally brought before a justice and indicted as well. Moreover, an information can be filed by the Attorney-General *ex officio*, or by the Master of the Crown Office with leave from the King's Bench Division at the instance of a private individual. With the jurisdiction of the coroner's court we have already dealt; [3] it is necessary to add a few words as to criminal informations.

### *Criminal Informations.*

Criminal informations are of two kinds :—

(i.) Those filed by the Attorney-General himself, usually called *ex officio* informations.

(ii.) Those filed by the King's Coroner by the direction of the King's Bench Division at the instance of some private individual, who is called the "relator."

(i.) The Attorney-General has a right, by virtue of his

[1] See the indictment in the Appendix, No. 12.

[2] A coroner is empowered to accept bail for a person against whom a verdict of manslaughter has been found by his jury : 50 & 51 Vict. c. 71, s. 5 (2).

[3] *Ante*, pp. 1031, 1032.

office, to file a criminal information in respect of any misdemeanour, but he only does so in cases of so dangerous a nature as to call for immediate suppression by the officers of the State. He will not take the initiative unless the crime be eminently dangerous to the public welfare, or directly derogatory to the dignity of the Crown, or calculated to provoke public riot or disorder—such, for instance, as the publication of a seditious libel.

(ii.) In the second class of informations the relator is usually some private individual, who has been aggrieved by some infringement of a public right or neglect of a public duty on the part of the defendant. But still the act or omission must be such as calls for the prompt and immediate interference of the Court. Nor will a criminal information be granted, unless the Court is satisfied that the ordinary remedies by action or indictment are insufficient in the particular case. Thus an information for a nuisance will not, as a rule, be granted unless the public have a direct and independent interest in the prompt suppression of the nuisance.[1] Criminal informations may also be filed against judges and magistrates for illegal, unjust, and wilfully oppressive conduct, provided such conduct arises from corrupt and malicious motives, and not from mere error of judgment.[2] But an information for libel will not be granted, unless the person libelled holds some public office or position in England and has been attacked in his public character;[3] or unless the libel tends to obstruct the course of justice or to prejudice the fair trial of any accused person. No criminal information for libel will lie where the words complained of are privileged by reason of the occasion on which they were published, or where they appear to be true, or where they can no longer exercise any prejudicial influence.[4]

A criminal information, then, differs from an indictment in five important particulars. There is no preliminary investigation before a

[1] *R.* v. *Casey* (1876), 13 Cox, 310.
[2] *R.* v. *Marshall* (1855), 4 E. & B. 475; and see *ante*, p. 183.
[3] *R. pros. Vallombrosa* v. *Labouchere* (1884), 12 Q. B. D. 320; see *ante*, p. 169.
[4] See Odgers on Libel, 4th ed., at pp. 433—438. The latest criminal information for libel is *R.* v. *Russell* (1905), 93 L. T. 407.

magistrate; an information does not go before the grand jury; it lies only for a misdemeanour; it cannot be tried at quarter sessions; and it is tried on the civil side of the Court.[1] In the case of an *ex officio* information, which now rarely occurs, the defendant is put on his trial as speedily as possible, on the mere information of the Attorney-General. In the more usual case of an information by the King's Coroner, the leave of the King's Bench Division must be obtained before the information is issued;[2] and the arguments in open Court on the application for such leave take the place of the investigations by a justice of the peace and by a grand jury, which precede the trial of an indictment.

The counsel for the relator must move the Court upon proper affidavits for an order *nisi* calling upon the defendant to show cause why an information should not issue. The motion must be made within a reasonable time after the offence complained of.[3] The relator, too, must come to the Court in the first instance, and must not have attempted to obtain redress in other ways.[4] He must submit himself to the Court, and consent to waive his civil remedy by action, if need be, and must be prepared to go through with the criminal proceedings to conviction. In cases of libel the relator must also swear to his innocence in all particulars of the charge contained in the libel.[5] For although, at the trial of the information when granted, truth will be no defence (except under Lord Campbell's Act), still it is "sufficient cause to prevent the interposition of the Court in this extraordinary manner," and the Court will leave the prosecutor to proceed by way of indictment.[6]

On a later day the defendant will appear by counsel or in person to show cause why a criminal information should not issue against him; this is called the argument on the order *nisi*. He generally files affidavits in reply to those read on the former occasion. If the order be made absolute, the relator must enter into a recognizance to effectually prosecute the information and to abide by and observe the order of the Court. The amount of the recognizance is fixed at £50.[7] If the order be discharged on the merits, the Court generally gives the defendant his costs. And no second application for a criminal information may be made to the Court, even upon additional affidavits—except in very peculiar circumstances, as where the only person who had made an affidavit on behalf on the defendant on the argument of the first order has since been convicted of perjury in respect of such affidavit.[8] But he "can still prefer an indictment" in the ordinary way.[9]

The information must set out the offence with all the certainty and

[1] *R.* v. *Hausmann*, [1909] W. N. 198.
[2] 4 Will. & M. c. 18, s. 1; Crown Office Rules, 1906, r. 35.
[3] Crown Office Rules, 1906, r. 37; as to a justice of the peace, see r. 36.
[4] *Ex parte Pollard* (1901), 17 Times L. R. 773.
[5] *R.* v. *Webster* (1789), 3 T. R. 388.
[6] *R.* v. *Bickerton* (1722), 1 Stra. 498.
[7] Crown Office Rules, 1906, r. 35.
[8] *R.* v. *Ere and Parlby* (1836), 5 A. & E. 780.
[9] *Per* Lord Denman in *R.* v. *Cockshaw* (1833), 2 Nev. & Man. at p. 379.

precision of an indictment.[1] As soon as it is filed a copy must be served on the defendant, who must appear thereto within the times specified in the Crown Office Rules of 1906, which minutely regulate the procedure on criminal informations. If he does not, he may be attached under a judge's warrant.[2]

A criminal information not *ex officio* will be tried on the civil side of the assizes for the county in which the misdemeanour was committed—unless a trial at bar be ordered, when it will be tried on the civil side of the King's Bench Division.[3] In either case there will be a jury, common or special. A special jury can be obtained either by the prosecutor or the defendant, upon giving a similar notice to that required in civil cases.[4] The procedure at the trial of an information in all respects resembles that on the trial of an indictment—save that in *ex officio* informations the counsel for the Crown (whether the Attorney-General himself or anyone appearing for him) has the right to reply although the defendant calls no witness.[5] If the defendant be found guilty the Court will hear evidence in aggravation or mitigation of sentence.

A defendant, who is convicted on the trial of a criminal information, may appeal to the Court of Criminal Appeal as in the case of conviction on indictment.[6]

[1] For precedents of criminal informations, see Odgers on Libel and Slander, 4th ed., at pp. 744—748.

[2] 48 Geo. III. c. 58, s. 1.

[3] Informations could also be brought in former days in the Court of Exchequer in respect of property or revenue of the Crown, for intrusion, for breach of the excise laws, etc.

[4] Crown Office Rules, 1906, r. 147.

[5] *R.* v. *Horne* (1777), 20 St. Tr. 651, 660.

[6] 7 Edw. VII. c. 23, s. 20 (2).

## Chapter VIII.

### THE TRIAL OF AN INDICTMENT.

Before the first day of the assizes or quarter sessions arrives, the persons who are to serve on either the grand jury or the petty jury are summoned to attend. There is no special jury at any assize or quarter sessions—though one can be obtained for a trial at bar in the King's Bench Division—and the fact that a man's name is on the special jury list for civil cases affords him no ground for claiming exemption from serving on the petty jury in criminal cases. The grand jurymen at the assizes and borough quarter sessions need not have any property qualification; but the grand jurymen at county quarter sessions and all petty jurymen must possess a certain small property qualification.[1]

The grand jury are sworn in public court, and then "charged" by the presiding judge, who advises them as to the strength of the evidence which supports the more difficult cases. They then retire to their own room to consider in private the indictments preferred to them. Every case goes before them, even where the prisoner has already been committed for trial by a magistrate. A grand jury consists of any number of persons from twelve to twenty-three; there need never be more; twelve of them must be unanimous before they can find "True bill" or "No bill." Their duty is not to try the case, but to see whether there is a case to be tried; they do not decide either questions of fact or questions of law. Hence they only hear the witnesses for the prosecution, and in a clear case only one or two of them.

[1] Each must own a freehold of the value of £10 a year or be a leaseholder, for a term of at least twenty-one years, of lands of the value of £20 a year, or occupy a house rated at not less than £20, or in Middlesex, £30 a year. It is strange that a property qualification is still required for the grand jury at county quarter sessions, whereas the property qualification of justices of the peace who are the judges of the Court was abolished by 6 Edw. VII. c. 16. Public officers are exempt from serving on juries, *e.g.*, post office officials under the Post Office Act, 1908 (8 Edw. VII. c. 48), s. 43.

But before they throw out a bill they should hear all the witnesses for the prosecution. They have power to administer an oath.[1] It is no part of their duty to consider the prisoner's defence or the prisoner's sanity; the prisoner himself has no right to give evidence before them:[2] in fact, he is not allowed to be present in the grand jury room.

If the grand jury consider that the evidence disclosed is such that no reasonable jury would convict the prisoner, they return the bill into court indorsed "No true bill," and signed by one or two of their number. The accused is then dismissed, but the bill may be presented again at a subsequent assize or sessions and be found a true bill.

Where the grand jury have found a true bill,[3] the next step is to "arraign" the prisoner, *i.e.*, to call him to the bar of the Court, read to him the substance of the indictment and ask him to plead to it. The prisoner may then either—

(i.) plead guilty, whereupon nothing remains but to sentence him, unless he withdraws his plea before sentence and pleads "Not guilty,"[4] or

(ii.) stand mute,[5] in which case a plea of "Not guilty" will be entered for him, or

(iii.) demur to the indictment, or

(iv.) move to quash the indictment, or

(v.) plead to the jurisdiction of the Court, or

(vi.) plead specially in bar, or

(vii.) plead "Not guilty" or the "general issue" as it is still sometimes called.

(iii.) A demurrer is an objection, written on parchment and filed, by which the prisoner admits the facts alleged against him, but denies that

[1] 19 & 20 Vict. c. 54, s. 1.

[2] *R.* v. *Rhodes*, [1899] 1 Q. B. 77.

[3] A prisoner may also be arraigned on a criminal information (see *ante*, p. 1059), or on a coroner's inquisition (see *ante*, p. 1032), as well as on an indictment.

[4] *R.* v. *Plummer*, [1902] 2 K. B. 339.

[5] 7 & 8 Geo. IV. c. 28, s. 2. If there is any doubt as to whether a prisoner is standing mute of malice or *ex visitatione dei*, a jury will be sworn to determine the question. Similarly, if there is any doubt as to his sanity, and if the jury's verdict amounts to a finding that the prisoner is insane, the judge can order him to be detained in a criminal lunatic asylum during His Majesty's pleasure under the Criminal Lunatics Act, 1800 (39 & 40 Geo. III. c. 94): *R.* v. *Stafford Prison* (*Governor*), [1909] 2 K. B. 81; and see also the Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64).

they amount to the crime charged in the indictment. Hence he cannot without special leave demur and then plead "Not guilty," if his demurrer fails. A prisoner, therefore, rarely demurs, but pleads "Not guilty" and raises his objection to the indictment in arrest of judgment, after all questions of fact have been decided by the verdict of the jury.

(iv.) Formerly it used to be held that a motion to quash the indictment must be made before the prisoner pleaded;[1] but for a long time it has been settled that, although it is more convenient to do so then, it is not essential,[2] and such an application can be made after the prisoner has pleaded,[3] or even after the case for the prosecution has closed.[4] The Court will not, as a rule, quash an indictment for a crime of enormity, such as high treason, on a motion to quash. Objection to an indictment in such cases must be taken on motion in arrest of judgment.[5]

(v.) A prisoner may plead want of jurisdiction in the Court in respect of either the crime charged or of the place where it was committed.

(vi.) There are three special pleas in bar:—

(a) "Autrefois acquit;"

(b) "Autrefois convict;" under both which pleas the Court must be satisfied (1) that the prisoner was "in jeopardy"[6] under the former indictment;[7] (2) that the offence charged is the same in both indictments; and (3) that a verdict was given on the former indictment.[8]

A conviction for assault by justices in petty sessions, at the instance of the person assaulted, and imprisonment consequent thereon are not either at common law or under the 24 & 25 Vict. c. 100, s. 45, a bar to an indictment for manslaughter of the person assaulted, should he subsequently die from the effects of the assault.[9]

(c) Pardon.

(vii.) The plea of "Not guilty" is the most usual, as it is a general traverse of the whole indictment. It should, therefore, stand alone; but by Lord Campbell's Libel Act[10] the defendant on an indictment for libel may plead, in addition, that the words are true, and that their publication was to the public benefit. This plea of justification is the only case in purely criminal matters in which a prisoner is allowed to plead two pleas at the same time—not guilty, as well as justification. In cases which are criminal in form but civil in substance, the defendant always has the right to plead not guilty and add other pleas. Thus, on an indictment for non-repair of a highway the prisoner may plead that he is not guilty and also that a neighbouring landowner is bound to repair the highway in

[1] *R.* v. *Rookwood* (1696), 13 St. Tr. 139.
[2] *R.* v. *Chapple and Bolingbroke* (1892), 17 Cox, 455.
[3] *R.* v. *Heane* (1864), 4 B. & S. 947.
[4] *R.* v. *James* (1872), 12 Cox, 127.
[5] *R.* v. *Lynch*, [1903] 1 K. B. 444.
[6] *Wemyss* v. *Hopkins* (1875), L. R. 10 Q. B. 378.
[7] For this reason acquittal on a motion to quash will not suffice.
[8] Hence if the grand jury threw out the bill or the petty jury disagreed, the prisoner cannot plead "Autrefois acquit."
[9] *R.* v. *Morris* (1867), L. R. 1 C. C. R. 90; followed in *R.* v. *Friel* (1891), 17 Cox, 325.
[10] 6 & 7 Vict. c. 96, s. 6.

question *ratione tenuræ*. In all other criminal charges the prisoner cannot, without leave, plead a special plea or demur in addition to pleading the general issue.[1] If he does not get leave and relies solely on his special plea or demurrer, for example, a plea of "autrefois acquit" on a charge of misdemeanour, and fails to prove it, he will at once be sentenced.

If the prisoner pleads "Not guilty," the clerk of the Court calls into the box the petty jurors,[2] who enter the box as their names are called. Subject to the right of challenge[3] on behalf of the prisoner or of the Crown, the first twelve called, who answer to their names, are sworn and—in the case of a felony—the prisoner is "given in charge" to them, that is, the clerk tells them shortly of what offence the prisoner is accused, adding the words, "And your charge is to inquire whether he be guilty or not guilty and to hearken to the evidence."

As soon as a prisoner has been arraigned and pleaded "Not guilty" and the jury which is to try him has been sworn, counsel for the prosecution opens the case for the Crown. The prosecution always begins, for the prisoner is presumed innocent until he is found guilty. If no one appears to prosecute him he will be discharged, for he "stands upon his deliverance." Counsel generally commences his opening speech by defining the crime which is defined in the indictment, and stating what the law requires him to prove before he can ask the jury to convict the prisoner. Then he states succinctly and in chronological order the facts upon which he relies as establishing the guilt of the accused. It is his duty to state clearly and impartially every material fact which he believes his witnesses can prove, whether such facts tend to establish the prisoner's guilt or not; he must not state any fact which he is not prepared with evidence to prove. He need not at this stage of the proceeding comment on or even allude to any evidence which he understands the

[1] *R.* v. *Strahan* (1855), 7 Cox, 85; *R.* v. *Sheen* (1859), 8 Cox, 143.

[2] See note, *ante*, p. 1060.

[3] Challenges may be either (a) peremptory, *i.e.*, giving no reason; or (b) for cause, and may be either against the whole array of jurors summoned, or against individual jurors called into the box. The prisoner may, without assigning any cause, challenge in a case of treason thirty-five, and in a case of felony twenty, individual jurymen.

prisoner's witnesses are prepared to give, and he should abstain from all invective against a fellow-citizen who has not yet been proved guilty of any offence.

Counsel then proceeds to call the witnesses for the prosecution, who will be cross-examined by the prisoner or his counsel, and perhaps re-examined by the counsel for the prosecution. If material documents are produced by any of these witnesses, they are read to the jury by the clerk of the Court.

### *Examination of Witnesses.*[1]

The result of a criminal prosecution depends largely on how the witnesses are handled. The examination of a witness by the counsel who calls him into the box is known as "examination-in-chief." The opposing counsel has always the right to cross-examine any witness who has given evidence for the other side, though it is not always wise for him to do so. If the witness be cross-examined, the first counsel may re-examine him on any point which arises out of the cross-examination. Different rules govern the examination-in-chief, the cross-examination and the re-examination of witnesses.

When examining in chief it is the duty of counsel to bring out clearly and in proper chronological order every relevant fact, to which the witness can depose in support of his case. He must confine his questions strictly to what is relevant, and must be prepared to prove all relevant facts by admissible evidence. Anything that goes to prove a material fact is relevant; everything else will be excluded. And relevant facts must be proved in the proper way. If he either seeks to prove an irrelevant fact, or to prove a relevant fact by inadmissible evidence, counsel on the other side will at once rise and object. An objection as to the admissibility of any evidence must be taken as soon as it is tendered; it will be very difficult to raise any objection after the evidence has been once received.

[1] The law as to what witnesses are competent, and what compellable, in a criminal case is discussed in the next chapter, *post*, pp. 1081—1084.

Counsel examining in chief must not ask leading questions. A leading question is one which suggests to the witness the answer which it is desired he should give to it. Counsel may not put such a question to his own witness, unless it is merely introductory or relates to matters as to which there is no dispute.

A party may not attack the character of a witness whom he has called himself, or call evidence to contradict him ;[1] for by voluntarily placing him before the Court to give evidence the party represents to the judge and jury that the witness is worthy of belief. It sometimes happens, however, that a witness shows a decided bias against the party who called him, and a reluctance to state anything that tells in his favour. In such a case the judge may allow that witness to be treated as hostile, that is, to be treated as though he had been called by the other side. Then he may be cross-examined and contradicted ; he may be asked leading questions ; he can also be asked as to any previous statement made by him (such as a signed proof of his evidence) ; and after his attention has been called to the particular portions which are inconsistent with his present evidence, such statement, if in writing, may be put in evidence to contradict him.[2]

In cross-examination counsel has a much freer hand than when examining in chief. He may ask any number of leading questions. And he need not confine his questions to the facts in issue ; he may branch out into many collateral matters ; he may attack the character and impugn the credit of the witness to any extent which his instructions justify. But he should use the liberty guardedly. He must put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness or in which that witness had any share. But in all other matters it is often safer to ask too little than too much.

Reckless cross-examination often lets in awkward pieces of evidence which were hitherto inadmissible. Thus, if counsel for the prisoner asks a witness called for the prosecution as to part of a conversation which that witness had with a third person on a certain day when the prisoner was not present, counsel for the Crown will be entitled, if he wishes, to bring out the whole of that conversation in re-examination, although it was not admissible in chief. So if either counsel reads part of any document in

[1] Except where he is compelled by the law to call that particular person as his witness, *e.g.*, an attesting witness to a will.

[2] Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 23, 24.

cross-examination, he renders the whole document admissible and makes it part of his case; if he reads any letter written by the witness, he will let in the reply to it.

On the other hand, witnesses under cross-examination may be asked, and will be compelled to answer,[1] questions not only as to the facts of the case but also as to matters not material to the issue, with the view of impugning their credit and thus shaking their whole testimony; this is called "cross-examining to credit." But, in order to prevent the case from thus branching out into all manner of irrelevant issues, it is wisely provided that on such matters the answer of the witness must be accepted as final; no evidence can be called to contradict. But to this rule there are exceptions. For instance, a witness can always be asked whether he has not been convicted of a crime, and if he either denies the fact or refuses to answer, the opposite party may prove his conviction, although the conviction of the witness on some former occasion may be wholly irrelevant to the issue as to the guilt or innocence of the prisoner now in the dock.

The object of re-examination is merely to give the witness an opportunity of explaining any seeming inconsistency in his answers, and of stating the whole truth as to any matter which was touched on, but not fully dealt with, in cross-examination. Counsel, when re-examining, can ask no question that does not arise out of the cross-examination, except by consent; he may not ask any leading question; and he should not ask again any question which he has already asked in chief.

The counsel for the prosecution always can and usually does put in evidence the prisoner's statement made before the magistrates not on oath, whether it tells in favour of the prisoner or not, and whether the prisoner is going to give evidence before the jury or not.[2] In certain cases it is necessary to show that the indictment has been laid before the grand jury with the consent of the Attorney-General or of the Public Prosecutor. This is usually proved by producing his consent in writing. The Court will take judicial notice of the signature of the Attorney-General, but not, apparently, of that of the Public Prosecutor.[3] This must be proved in the same way as the handwriting of any private individual.

This closes the case for the prosecution. If at this stage

[1] There are some questions, however, which a witness will not be compelled to answer, either in cross-examination or in chief; see *post*, pp. 1084—1086.
[2] *R.* v. *Bird* (1898), 79 L. T. 359.
[3] *R.* v. *Turner*, [1910] 1 K. B. 346.

of the proceedings the judge is of opinion that there is no evidence to go to the jury, he ought to direct them to acquit the prisoner. He is not bound to do so, and, if the prisoner is represented by counsel, will usually not do so, unless the counsel makes an application for the purpose.[1]

If, however, a *primâ facie* case has been made out and the prisoner intends to call witnesses other than himself, his counsel or—if he be not defended by counsel—he himself now opens his case, and the witnesses for the defence will then be examined-in-chief, cross-examined, and, if necessary, re-examined.

At this stage it is possible that the prosecution may desire to call rebutting evidence. If the defence has called evidence as to facts which could not have been controverted by the prosecution when calling witnesses, or if the prisoner calls witnesses to show that he is a person of good character, the prosecution may, if it can, call witnesses to disprove the new facts set up by the defence or to show that the prisoner is a person of bad character. But evidence will not be allowed to be called in rebuttal merely because the prosecution has forgotten or neglected to call the necessary witnesses at the outset.

If, however, the prisoner does not intend to call any witness as to the facts of the case besides himself, now is the time for him to go into the witness-box and give evidence on oath if he wishes to do so;[2] and it is the duty of the judge to make it clear to him that he has this right.[3] Where this course is adopted by a prisoner who is not defended by counsel, there is only one speech made by counsel throughout the trial, namely, his opening.

### *Speeches of Counsel.*

After the case for the prosecution is concluded and the prisoner has given evidence if he wishes so to do, the remaining steps in the proceedings and the number of speeches

[1] *R.* v. *George* (1909), 73 J. P. 11.
[2] Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1.
[3] *R.* v. *Tate*, [1908] 2 K. B. 680.

which counsel are permitted to make depend practically on two considerations: (i.) Is the prisoner defended by counsel? (ii.) Does the prisoner intend to call any witnesses as to the facts other than himself? We have already mentioned that each counsel (or if none is retained for the defence, the prisoner) is entitled to "open"—that is, to state to the jury—his own case. But in addition to these opening speeches there are two other kinds of speeches which may be made. In some cases counsel may "sum up his own evidence;" in other cases he may make "a general reply"—that is, a speech in which he not only sums up his own evidence, but also deals with the evidence called against him and answers the arguments of his opponent.

It is only where the prisoner is defended by counsel that counsel for the prosecution has a right to sum up his case,[1] and it is only where the prisoner calls witnesses, other than himself, who speak to the facts of the case and not merely as to the prisoner's character, that the prosecuting counsel has a right to reply (unless he be the Attorney or Solicitor General, who have the right of reply in all cases, though they do not always exercise it). Witnesses, who speak merely to the character of the prisoner, are usually called at the end of the case. The counsel for the prosecution has a right to cross-examine them, but as a rule he does not do so.

It is necessary to deal in some detail with the order of the speeches. There are four cases to be dealt with:—

(i.) *Where the prisoner is not defended by counsel, and calls no witness to the facts except himself.*

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.
3. Prisoner's statement before the magistrates.
4. Prisoner gives evidence if he wishes.
5. Prisoner makes a speech in his defence.
6. Witnesses as to prisoner's character.

Counsel for the prosecution has no opportunity of commenting on the prisoner's evidence.

(ii.) *Where the prisoner is not defended by counsel, but calls witnesses as to the facts, in addition to giving evidence himself.*

[1] 28 & 29 Vict. c. 18, s. 2.

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.
3. Prisoner's statement before the magistrates.
4. Prisoner opens his case.
5. Prisoner calls his witnesses, including himself, if he wishes, and witnesses to character, if any.
6. Prisoner sums up his case.
7. Counsel for the prosecution replies on the whole case.

(iii.) *Where the prisoner is defended by counsel, who calls no witness to the facts except the prisoner.*

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.
3. Prisoner's statement before the magistrates.
4. Prisoner gives evidence, if he wishes.
5. Counsel for the prosecution sums up his case.
6. Prisoner's counsel speaks in his defence.
7. Witnesses to character.

Counsel for the prosecution has an opportunity and a right to comment on the prisoner's evidence.[1]

(iv.) *Where the prisoner is defended by counsel, who calls other persons besides the prisoner to give evidence as to the facts.*

1. Counsel for the prosecution opens his case.
2. Witnesses for the prosecution.
3. Prisoner's statement before the magistrates.
4. Prisoner's counsel opens the defence.
5. Witnesses for defence, including, if counsel thinks fit, the prisoner and witnesses to his character.
6. Prisoner's counsel sums up the case for the defence.
7. Counsel for the prosecution replies on the whole case.

### *Summing-up and Verdict.*

When the speeches of counsel are ended, the judge proceeds to sum up the case to the jury, that is, he calls the attention of the jury to the more important facts which bear on either side, and directs them as to the law.[2] The judge should lay down the law in general terms, and should then make such observations and explanations as are required by the particular case then before the Court. The jury are bound to apply the law in accordance with the judge's direction, but if he expresses an opinion as to the facts—as he may, if he thinks fit—they are not bound to follow his

[1] *R.* v. *Gardner*, [1899] 1 Q. B. 150.
[2] See the remarks of Lord James of Hereford in *Clouston* v. *Corry*, [1906] A. C. at pp. 129, 130.

opinion, for it is their province, and not his, to weigh the evidence and to decide what is the proper inference to be drawn from the facts proved.

In criminal cases a higher degree of proof is required than in civil, for the jury should not convict an accused person, unless they are satisfied that his guilt has been proved "beyond reasonable doubt." If, after giving the matter full consideration, the jury find that the evidence has not induced in them such a belief in the prisoner's guilt as honest men would reasonably act upon in the ordinary affairs of business life, it is their duty not to convict him.

The jury may, if they wish, retire to consider their verdict. The verdict must be the unanimous voice of the twelve jurymen.[1] They have to say whether on the facts proved and the law, as explained to them by the judge, they find the prisoner "Guilty" or "Not Guilty:" this is called a "general verdict." They have it in their discretion to find the prisoner "Guilty" on the whole of the indictment, or "Guilty" on some counts, but not on others; indeed, if a count be divisible they may find the prisoner guilty on one part of that count and not on the residue. They can, in a few cases,[2] convict him of an offence other than that established by the evidence. The first delivery of the verdict is not necessarily final; they may be directed by the Court to reconsider it.

If they have been locked up for several hours without any prospect of their agreeing as to a verdict, if any one of the jury dies or falls so ill that it would be some days before he would be able to sit again, if one of them leaves the jury-box and the Court without leave—in these and many other similar cases the Court may discharge them, and have a new jury sworn.

If the jury acquit the prisoner, he is discharged, unless he is to be tried on another indictment. If they find him guilty, they may at the same time, if they think fit, recommend him to the mercy of the Court. If they find him "Guilty but insane," the judge will order him to be detained in a criminal lunatic asylum until His Majesty's pleasure be known. The jury may also find a special verdict setting forth the facts which have been established to their satisfaction, and adding that, if these facts amount in

[1] But a majority—if it consist of twelve—suffices in a grand jury or a coroner's jury; and in Scotland a bare majority from the jury of fifteen.

[2] See *post*, pp. 1071, 1072.

law to a criminal offence, they find him guilty of that offence.[1] Only a jury can find a man guilty or not guilty on an indictment.

The indictment, as we have seen, defines the precise charge which the prisoner is called upon to answer and of which the jury must either acquit or convict him. But where the words used in charging one offence include those used in another minor offence of the same class, the jury can reject part of the averment and convict of the minor offence alone. Thus a jury may reject from an indictment for murder the words "of malice aforethought" and "and murder," thus reducing the charge to one of manslaughter, of which they can find the prisoner guilty, although he is only charged with murder in the indictment.[2] Again, on an indictment for any crime the jury may convict of an attempt to commit it.[3]

Many statutes have been passed which enable a prisoner who is charged with one crime to be convicted of another. Thus, on an indictment for robbery, the prisoner may be convicted of assault with intent to rob;[4] but not of a common assault. On an indictment for larceny, the prisoner may be convicted of embezzlement; on an indictment for embezzlement he may be convicted of larceny. But he cannot in either case be convicted of false pretences, and for two reasons: (a) because that crime is a misdemeanour; and (b) because the prisoner is entitled to have the false pretences set out in full in the indictment.[5] (but he can since 1916) †

Where on indictment for any misdemeanour the evidence shows that the prisoner really committed a felony, the prisoner can nevertheless be convicted of the misdemeanour. Thus if a prisoner is indicted for obtaining money by false pretences (which is a misdemeanour) and the evidence shows that the prisoner was really guilty of felony, *e.g.*, larceny or forgery, he can be convicted of false pretences, if he used any false pretence. But he cannot be convicted of felony on an indictment for misdemeanour; when therefore it is doubtful which offence the evidence will prove, it is safer to indict him for the felony.[6] Where an indictment alleges a minor offence, but the evidence shows him to be guilty of a more serious offence, the prisoner can only be convicted of the offence charged.[7]

But without special statutory enactment no one indicted for a felony can

[1] See, for an example of a special verdict, *R.* v. *Dudley and Stephens* (1885), 14 Q. B. D. at pp. 273—5; and also *ib.*, p. 560.
[2] For another instance, see *R.* v. *Hodgkiss* (1869), L. R. 1 C. C. R. 212, *ante*, p. 189.
[3] 14 & 15 Vict. c. 100, s. 9.
[4] 24 & 25 Vict. c. 96, s. 41.
[5] *Ib.*, s. 72.
[6] 14 & 15 Vict. c. 100, s. 12; 24 & 25 Vict. c. 96, s. 88.
[7] 14 & 15 Vict. c. 100, s. 9.
† 4 + 5 Geo V s. 39

be convicted of a misdemeanour ; such special statutory enactment exists in three cases :—

(a) on an indictment for murdering a newly-born child, the prisoner may be convicted of concealment of birth ;[1]

(b) on an indictment for cutting, stabbing, or wounding with felonious intent, the prisoner may be convicted of the misdemeanour of unlawfully wounding, but not of common assault ;[2]

(c) under the Criminal Law Amendment Act, 1885, a prisoner who is indicted for rape may be convicted of a misdemeanour under that Act.[3]

There may, after verdict, be other issues for the jury to try, such as, Has the prisoner been previously convicted, or is he an habitual criminal ? The judge may also hear witnesses as to the prisoner's antecedents and general character, to enable him to decide on the amount of punishment which he will award the prisoner. These the judge will examine himself either on oath or not, as he may think fit, and in so examining them he is not limited by the ordinary rules of evidence. But the prisoner is not entitled at this stage of the proceedings to give evidence on oath in mitigation of his punishment.[4]

Then in cases of felony the prisoner is asked if he has anything to say why the Court should not proceed to judgment. At any time between verdict and sentence the counsel for the defence may move in arrest of judgment, but only on some point of substance arising on the face of the record, *e.g.*, such uncertainty in the indictment as cannot be amended by the Court and has not been cured by verdict. If the motion succeeds, the prisoner will be discharged, but such discharge is not equivalent to an acquittal ; he may be re-arrested and tried on a fresh indictment for the same offence. If no such motion be made, or if it fails, the judge proceeds to pass sentence, and the prisoner is then delivered to the proper authorities to undergo his punishment.[5] Before leaving the Court, he may, if he thinks fit, apply to the judge for leave to appeal on any question of fact or of mixed law and fact.[6]

[1] 24 & 25 Vict. c. 100, s. 60.
[2] 14 & 15 Vict. c. 19, s. 5.
[3] 48 & 49 Vict. c. 69, s. 9 ; *R.* v. *Williams*, [1893] 1 Q. B. 320.
[4] *R.* v. *Hodgkinson* (1900), 64 J. P. 808.
[5] But see Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), s. 7 (2).
[6] See *post*, pp. 1108, 1109.

## Chapter IX.

### EVIDENCE.

At any trial, civil or criminal, the burden of proof lies generally on the plaintiff or prosecutor; he therefore begins; it is his duty to establish the case against the defendant or the accused, and this he must do by evidence.

The rules of evidence are substantially the same whether an action is tried by judge alone or by judge and jury, or if a charge of crime is tried summarily by a magistrate or is submitted to the verdict of a jury.

Where there is a jury, the general rule is that the judge decides all questions of law, and the jury all questions of fact. Hence it is for the judge to determine what facts are admissible in evidence; it is for the jury to weigh the evidence and find the verdict. The judge must exclude all evidence that is irrelevant and therefore inadmissible; he will also take care that each relevant fact is proved in a legitimate way. But when once the evidence has been properly admitted, it is for the jury, not the judge, to determine its value and cogency, and to decide what is the proper inference to be drawn from it. Thus, at a criminal trial, the evidence will be rigorously confined to matters which are relevant to the inquiry whether the prisoner is or is not guilty of the offence with which he is charged. Each of these matters must be proved in a legitimate way; and then the jury must consider collectively the facts thus proved, and decide whether the prisoner is guilty or not. So, in civil cases, every fact tendered in evidence must be strictly relevant to some one or other of the issues in the case; the judge will decide the validity of all objections to any proposed method of proving such relevant facts, and the jury the weight to be attached to such facts, when admitted.[1]

[1] The ordinary law of evidence must be applied in courts martial (Army Act, 1881 (44 & 45 Vict. c. 58), s. 128 and Rules of Procedure, r. 73), by revising barristers (*Storey* v. *Town Clerk of Bermondsey*, [1910] 1 K. B. 203), and by arbitrators (*In re Enoch and Zaretzky, Bock & Co.*, [1910] 1 K. B. 327).

Hence the law of evidence is divided into three parts — Relevancy, Proof and Cogency.

Relevancy defines what facts a party will be allowed to prove at the trial of any legal proceeding. The law selects — sometimes rather arbitrarily — certain matters which it accepts as "relevant," and these alone may be proved in court; it rejects many others which a layman might deem material.

Proof tells a litigant in what way he will be allowed to prove an admissible statement or fact. Sometimes there are many different ways of proving a relevant fact, all of which are equally permissible. In other cases the law excludes all but the "best" evidence of a fact. Thus, a copy of a letter will not be accepted, if the original is procurable; an eye-witness, if still alive, must himself be called, not a person to whom the eye-witness told what he saw.

Cogency determines what value the tribunal should attach to each statement or fact when admitted and proved.

## I.

As a rule, only those facts can be proved which are relevant to an issue. In criminal cases, the issue to be tried is determined by the indictment and the plea which the prisoner has pleaded to it; in civil cases, it is necessary to read the pleadings (if there are any), in order to ascertain what are the issues. Every fact, which directly tends to prove or disprove the matters in issue, is relevant and consequently admissible in evidence. And subject to certain restrictions, every fact which indirectly tends to prove or disprove such matters is also relevant and admissible. The law will not permit the parties to wander off into merely collateral matters.

Firstly, therefore, whatever a party to an action or proceeding has said or done in the transaction [1] is admissible in evidence against him: whatever he said or did in some other transaction is, as a rule, not admissible.

[1] A transaction is "a group of facts so connected together as to be referred to by a single legal name: as a crime, a contract, a wrong, or any other subject-matter of inquiry which may be in issue:" Stephen's Digest of the Law of Evidence, Art. 3.

The fact that A. in the past has committed a burglary is, as a rule, no proof that he committed the burglary with which he is now charged. So, too, if A. gave B. permission to pass over his field, that is no evidence whatever that he gave C. the same permission. Again, where C. alleges that A. sold him bad beer, he cannot call B. as his witness to state that A. sent him, B., bad beer, unless it is first shown that both supplies came from the same brewing.[1]

Secondly, evidence of what occurred in other transactions is relevant and admissible, whenever it throws material light upon the transaction in issue. Most of the cases in which such evidence is admissible can be grouped under four heads :—

(i.) Acts of ownership.

(ii.) Facts showing system.

(iii.) Facts showing what was the state of mind of the party at the time when he did the material act.

(iv.) General character.

(i.) *Acts of Ownership.*—Where the ownership of a particular plot of land is in issue, evidence will be admitted of acts of ownership done by the claimant or his predecessors in title over an adjoining plot of land if the judge is satisfied that there is such a "unity of character" between the two plots, that the jury may reasonably conclude that the person who owned or possessed such rights over the land to which the evidence relates, also owned or possessed those rights over the land which is in dispute in the action.[2]

(ii.) *Facts showing System.*—Whenever it is necessary to show that a person has pursued a systematic course of conduct, evidence of transactions not in issue will be admissible if they assist the Court in deciding the issue before it.

Thus, on a charge of murder, it was held that, in order to rebut the suggestion that the deceased died a natural death, the prosecution might put in evidence of other similar murders alleged to have been committed by the accused.[3] Again, where the prisoner was charged with false pretences by means of advertisements which suggested that he was carrying on a flourishing business, evidence was admitted that other persons had been misled by the same advertisement, in order to show that it was part of a scheme to deceive the public.[4] But such evidence will not be admitted, if it merely shows that the prisoner was in the habit of committing crimes of a similar nature and no more ; for that of itself ought

[1] *Holcombe* v. *Hewson* (1810), 2 Camp. 391.

[2] *Stanley* v. *White* (1811), 14 East, 332 ; *Doe* v. *Kemp* (1835), 2 Bing. N. C. 102 ; *Jones* v. *Williams* (1837), 2 M. & W. 326 ; *Dendy* v. *Simpson* (1856), 18 C. B. 831 ; *Hanbury* v. *Jenkins*, [1901] 2 Ch. 401.

[3] *Makin* v. *Att.-Gen. for New South Wales*, [1894] A. C. 57, 65.

[4] *R.* v. *Rhodes*, [1899] 1 Q. B. 77 ; and see also *R.* v. *Cooper* (1875), 1 Q. B. D. 19 ; *R.* v. *Thomson* (1900), 64 J. P. 456 ; *R.* v. *Wyatt*, [1904] 1 K. B. 188 ; *R.* v. *Barraclough*, [1906] 1 K. B. 201 ; and *Hales* v. *Kerr*, [1908] 2 K. B. 601.

not to weigh with the jury in deciding whether the prisoner is guilty of the particular offence for which he is being tried.[1]

(iii.) *Facts showing the State of Mind of a Party.*—In those cases where it is material to the issue to ascertain the state of mind of a person, the Court will admit evidence of what happened in other transactions, whether before or after the transaction in issue, if such evidence will in any way assist it to come to a conclusion upon the matter.

Thus in cases of arson, where—as may very likely happen—there is no direct evidence that the prisoner set light to the premises deliberately and not accidentally, evidence can be given of other fires caused by the prisoner and of suspicious circumstances connected with them.[2] The same rule applies to cases of murder by poisoning, in order to show that the poison was not given by accident.[3] This rule is of especial importance in cases of embezzlement; for it may well be that the clerk or servant has genuinely forgotten to pay over a few small sums, but it is almost impossible that he could do so with regard to a great number of such sums.[4] So, too, in cases of fraud, if the plaintiff has to show that the defendant knew that the representation was untrue and intended to mislead him, he can do so by showing that the defendant also deceived other people in the same way.[5] The Legislature has in one case—the offence of receiving stolen goods—made such evidence admissible where it was not allowed at common law.[6]

(iv.) *General Character.*—In criminal cases the prosecution cannot, before conviction, give evidence that the prisoner bears a general bad character, unless the prisoner or his counsel have set up that he bears a good character,[7] or unless the nature or conduct of the defence is such as to involve imputations on the prosecutor or his witnesses or the prisoner gives evidence against any other person charged with the same offence;[8] or unless the jury have to decide whether the prisoner is an "habitual criminal" or not.[9]

The character of the prosecutor is also, as a rule, immaterial, but, like any other witness, he can always be cross-examined "to credit." His answers are conclusive. In charges of rape and indecent assault, however, the defendant can adduce evidence to show that the prosecutrix is of generally immoral character,[10] and also to prove that on other occasions she had had voluntary connection with the defendant,[11] but not with other men.[12]

[1] *R.* v. *Fisher*, [1910] 1 K. B. 149.
[2] *R.* v. *Gray* (1866), 4 F. & F. 1102.
[3] *R.* v. *Geering* (1849), 18 L. J. M. C. 215.
[4] *R.* v. *Richardson* (1860), 2 F. & F. 343.
[5] *Blake* v. *Albion Life Assurance Society* (1879), 4 C. P. D. 94. See also *Pearson* v. *Lemaitre* (1843), 5 Man. & Gr. 700; and *Praed* v. *Graham* (1890), 24 Q. B. D. 53.
[6] Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 19. See *ante*, p. 375, and *R.* v. *Harding* (1909), 53 Sol. Jo. 762.
[7] *R.* v. *Rowton* (1865), L. & C. 520.
[8] See *post*, p. 1083.
[9] Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), s. 10.
[10] *R.* v. *Tissington* (1843), 1 Cox, 48.
[11] *R.* v. *Riley* (1887), 18 Q. B. D. 481.
[12] *R.* v. *Holmes* (1871), L. R. 1 C. C. R. 334.

Every witness, other than the prisoner,[1] is liable to be cross-examined with a view to showing that he is unworthy of credence, or, as it is termed, to be cross-examined as "to credit." But the witness's answer is final and cannot be contradicted,[2] unless he denies that he has been convicted of a crime; in that case the other side can always adduce evidence to show that he has been so convicted.[3]

Thirdly, whatever someone who is not a party to the proceedings said or did is, as a rule, not admissible in evidence against anyone who was not present or for any other reason had no opportunity for contradiction or explanation. But whenever something is said or done by third persons in the presence of a party, evidence of it is admissible, as it leads up to and explains what the party himself said or did on the same occasion.

Evidence of a person's acts are always more readily admitted than evidence of his words. In some cases they form part of the transaction in issue. Thus a prosecutor in a trial for burglary can always prove that he locked up his premises securely, leaving the stolen articles in a particular place, and that next morning he found the premises broken into and the articles gone, although he never saw the prisoner near the place. But on a charge of receiving stolen goods the theft must be clearly proved, and that cannot be done by showing that the thief has pleaded guilty to the charge. Even if the accused heard him do so, he would not be allowed to contradict the admission or to explain it away. The prosecution may, however, call the thief as a witness to prove the theft.

What a third person said behind the back of a party, when the words are so connected with the material act as really to form part of the transaction in issue, is admissible.

Thus, what bystanders said at the moment a shot was fired,[4] or a man was run over,[5] or when a seditious meeting was held,[6] or what the injured person said at the time of the assault,[7] is admissible, but only if contemporaneous with the act itself.[8] So, too, when the character in which a person signed a contract was in issue, what he said about the matter at the moment when he signed it is admissible.[9]

[1] As to the cross-examination of a prisoner who is giving evidence, see *post*, p. 1083.
[2] *R.* v. *Holmes, suprà*; *R.* v. *Gibbons* (1862), 31 L. J. M. C. 98.
[3] Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 25.
[4] *R.* v. *Fowkes* (1856), Stephen's Digest of the Law of Evidence, p. 4.
[5] *R.* v. *Foster* (1834), 6 C. & P. 325.
[6] *R.* v. *Hunt* (1820), 3 B. & Ald. 444, 566, 574; *R.* v. *Lord George Gordon* (1781), 21 St. Tr. 485, 535.
[7] *Thompson* v. *Trevanion* (1692), Skin. 402.
[8] *R.* v. *Bedingfield* (1879), 14 Cox, 341; *R.* v. *Gibson* (1887), 18 Q. B. D. 537.
[9] *Young* v. *Schuler* (1883), 11 Q. B. D. 651.

Again, whenever it has been established that two or more persons are engaged in a joint enterprise (whether a crime, or a tort, or a lawful act), whatever any of them said or did in furtherance of the common purpose is admissible against all of them whether the others were present at the time or not.

Thus, when a conspiracy has been proved and it has been shown that A. was a party to it, what A. said or did in order to bring about the desired result will be admissible not only as against himself, but also against all those who were taking part in the crime at the time.[1] But such acts or statements will be admissible against himself only, if they were not in furtherance of the common purpose,[1] or occurred after the conspiracy has succeeded or been abandoned.[2]

On a criminal charge of rape or indecent assault, evidence of statements made by the prosecutrix in the absence of the accused is admissible for the purpose of corroborating her story or of negativing her consent. But such statements must have been made at the earliest possible opportunity.[3] Evidence of this kind is admissible in no other case.[4]

Again, statements which a person, since deceased, has made relating to the circumstances which have caused his condition, are admissible on the trial of another person for the murder or manslaughter of the deceased,[5] but only if the statements were made at a time when the deceased was in "settled hopeless expectation" of death.[6] Such statements are called "dying declarations." The opinion which he held of his chance of surviving before or after the statement was made is immaterial,[7] and so is the length of time that he survived after making the statement.[8] The declaration must not be the result of an examination.[9] The deceased must at the time have been of such an age and in such a condition as to

[1] *R.* v. *Hardy* (1794), 24 St. Tr. 199, 451.
[2] *R.* v. *Blake* (1844), 6 Q. B. 126, 137.
[3] *R.* v. *Lillyman*, [1896] 2 Q. B. 167; *R.* v. *Osborne*, [1905] 1 K. B. 551.
[4] *Beatty* v. *Cullingworth* (1896), 60 J. P. 740.
[5] *R.* v. *Hind* (1860), 29 L. J. M. C. 147; but not in civil cases: *Stobart* v. *Dryden* (1836), 1 M. & W. 615, 626.
[6] *R.* v. *Woodcock* (1789), 1 Leach, 502; *R.* v. *Peel* (1860), 2 F. & F. 21; and see *R.* v. *Jenkins* (1869), L. R. 1 C. C. R. 187.
[7] *R.* v. *Hubbard* (1881), 14 Cox, 565.
[8] *R.* v. *Mosley* (1825), 1 Moo. C. C. 97; *R.* v. *Bernadotti* (1869), 11 Cox, 316.
[9] *R.* v. *Mitchell* (1892), 17 Cox, 503; but see *R.* v. *Fagent* (1835), 7 C. & P. 238.

realise the seriousness of his condition as well as the nearness of death.[1]

In any case, civil or criminal, statements made by a person, whether alive at the date of the trial or not, as to his bodily or mental feelings are relevant and admissible whenever his feelings or condition are material to the issue.[2] The statement is only admissible so far as it describes his physical symptoms; anything as to the cause of these symptoms will be excluded.[3]

What a third person believes or thinks is as a general rule irrelevant and inadmissible. In certain cases, however, a true opinion cannot be formed without special experience or training, and in such cases persons who have that experience or training are allowed to give evidence, not to decide the issue themselves, but to assist the tribunal to come to a right conclusion upon the matter in issue.

Unlike an ordinary witness, an expert can give his opinion,[4] and to support it he can detail experiments which he made behind the other party's back,[5] cite books of authority,[6] and quote other cases and transactions of a like nature.[7] The chief matters upon which such evidence is usually admissible are questions relating to medicine,[8] science, art, the course of business or commerce,[9] handwriting,[10] and foreign law.[11] In certain cases, too, even non-experts may give evidence of opinion. Where a witness is called as to facts, he frequently swears to matters of identity,[12] resemblance and age, measure

[1] *R.* v. *Pike* (1829), 3 C. & P. 598.
[2] *Aveson* v. *Lord Kinnaird* (1805), 6 East, 188; but see *Gilbey* v. *G. W. Ry. Co.* (1910), 102 L. T. 202.
[3] *R.* v. *Gloster* (1888), 16 Cox, 473. As to this principle in divorce, see *Trelawney* v. *Coleman* (1817), 1 B. & Ald. 90.
[4] See Powell on Evidence, 9th ed., 41—53.
[5] *R.* v. *Heseltine* (1873), 12 Cox, 404.
[6] *Nelson* v. *Bridport* (1845), 8 Beav. 527; *Sussex Peerage Case* (1844), 11 Cl. & F. 85.
[7] *R.* v. *Palmer* (1856), Stephen Hist. Cr. Law, III., 389; 5 E. & B. 1024.
[8] *Att.-Gen.* v. *Nottingham Corporation*, [1904] 1 Ch. 673; *Gardner Peerage Case* (1825), Le Marchant's Rep. 169—176.
[9] *Bond* v. *Barrow Hæmatite Steel Co.*, [1902] 1 Ch. 353; *Weld-Blundell* v. *Wolseley*, [1903] 2 Ch. 664; *In re Accrington, &c., Tramways Co.*, [1909] 2 Ch. 40.
[10] *Garrells* v. *Alexander* (1801), 4 Esp. 37; *R.* v. *Silverlock*, [1894] 2 Q. B. 766; *R.* v. *Turner*, [1910] 1 K. B. 346.
[11] See *Castrique* v. *Imrie* (1870), L. R. 4 H. L. at p. 434; *Wilson* v. *Wilson*, [1903] P. 157; *In re Turner*, [1906] W. N. 27.
[12] *Fryer* v. *Gathercole* (1849), 13 Jur. 542.

and capacity; for often it is impossible for anyone to separate a witness's opinion from his observation of the facts, and the exclusion of the former would seriously handicap the Court in determining the issue to be tried.

## II.

The facts by which a party intends to establish his case must not only be relevant; they must also be proved in a proper way. In certain cases he has no choice: he must prove the fact in the prescribed manner or not at all. In most cases, however, he may seek to prove the fact in a number of ways, all of which are equally permissible.

From the point of view of Proof, evidence may be divided into several cross-heads. Thus evidence is either—

(i.) Oral, *i.e.*, the spoken word of witnesses;

(ii.) Documentary, *i.e.*, the production of documents; or

(iii.) Real, *i.e.*, the production and inspection of things.

Some cases can be tried wholly upon oral evidence, but documents and things usually require certain facts to be proved by witnesses in order to make them admissible in evidence. As a general rule, witnesses can be called to prove any fact, but certain facts can only be proved by documents.

Documentary evidence is required in many cases by statute;[1] but it is a rule of the common law that whenever the parties to any agreement, grant or disposition have set out its terms in a writing which is intended to be a complete record of the transaction, no parol evidence is admissible to contradict or vary its terms.[2] Such evidence, however, is admissible to destroy the right of action altogether, *e.g.*, by showing that the parties never came to a final agreement,[3] or that the document produced is not the writing to which their agreement was reduced. Again, such evidence is admissible to annex customary incidents not inconsistent with the terms of the document.[4] And parol evidence is always admissible

[1] For example, by the Statute of Frauds (29 Car. II. c. 3) or by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71): see Powell on Evidence, 9th ed., pp. 172—180.

[2] *Price* v. *Ley* (1862), 32 L. J. Ch. 530; *Henderson* v. *Arthur*, [1907] 1 K. B. 10.

[3] *Pym* v. *Campbell* (1856), 6 E. & B. 370; *De Lassalle* v. *Guildford*, [1901] 2 K. B. 215.

[4] *Wigglesworth* v. *Dallison* (1779), 1 Smith, L. C., 11th ed., 545.

to show that the contract has been rescinded since it was made.[1]

Real evidence is especially resorted to when a question arises as to the nature, condition, identity or appearance of any particular object. The production or inspection of the thing itself, when properly identified and explained by some competent witness, is obviously the most reliable method of settling such a question. In proper cases an order for the inspection of such objects can be obtained, even before trial.[2]

When a witness comes into the box to give evidence, he is sworn to tell the truth, or he may make an affirmation to the same effect.[3] In former times, no one could be called as a witness unless he had a religious belief in the sanctity of an oath, but now-a-days any person, who objects to take an oath because he has a religious objection or because he has no religious belief at all, can make an affirmation, which is made by statute as binding as an oath.

Persons who are incompetent to understand the nature of an oath are at common law incompetent to give evidence. Such persons are idiots, lunatics and children.[4] But if any party alleges that a proposed witness is an idiot or a lunatic, the burden of proving this will lie on him.[5]

With regard to children the rule has been altered, and now a child who does not understand the nature of an oath can give unsworn testimony in any prosecution for offences under—

(i.) the Offences against the Person Act, 1861,[6] sections 27, 55 and 56; and, if committed against a child or young person, under sections 5, 42, 43, 52 and 56 of the same Act;

(ii.) the Criminal Law Amendment Act, 1885,[7] if committed on a child or young person;

(iii.) the Dangerous Performances Acts, 1879 and 1897;[8]

(iv.) the Prevention of Cruelty to Children Act, 1904;[9]

(v.) the Children Act, 1908, Part II.;[10] and also

[1] *Goss* v. *Lord Nugent* (1833), 5 B. & Ad. 58, 64; *Vezey* v. *Rashleigh*, [1904] 1 Ch. 634.

[2] See *post*, pp. 1094, 1238.

[3] For the form of the oath and its administration, see Oaths Acts, 1888 and 1909, (51 & 52 Vict. c. 46; 9 Edw. VII. c. 39).

[4] See *Harrod* v. *Harrod* (1854), 1 K. & J. at p. 9.

[5] *Anon.* (1795), 1 Leach, 430, n.; *R.* v. *Nicholas* (1846), 2 Car. & K. 246.

[6] 24 & 25 Vict. c. 100.

[7] 48 & 49 Vict. c. 69.

[8] 42 & 43 Vict. c. 34; 60 & 61 Vict. c. 52.

[9] 4 Edw. VII. c. 15.

[10] 8 Edw. VII. c. 67.

(vi.) in any prosecution for any other offence involving bodily injury to a child or young person.

In such cases, however, the Court, before allowing the child to give evidence, must be satisfied that the child is of sufficient intelligence to give evidence at all, and also that he or she understands the duty of speaking the truth.[1]

In civil cases the parties to the action are competent and compellable witnesses, that is, if one party thinks his case will be assisted by calling the other party as a witness, he can *subpœna* his opponent, who will then be obliged to go into the box and state on oath what he knows about the issues.[2] In criminal charges, however, although the prosecutor and his wife or her husband are competent witnesses either for or against the prisoner, the prisoner can be called as a witness for the prosecution in one case only—when the proceedings are brought to enforce a civil right, *e.g.*, an indictment for the obstruction of a public right of way.[3] In all other cases he can only be called as a witness for the defence, and then only by his own consent.[4] It is the duty of the judge to inform him of his right,[5] but if he does not choose to avail himself of that right, the counsel for the prosecution is not permitted to draw the attention of the jury to the fact,[6] but he may comment on the circumstances that before the justices the prisoner made no statement, but simply reserved his defence.[7] The judge, however, in his summing up may always comment upon the prisoner's neglect to give evidence at the trial.[8]

Counsel for the prosecution has not a free hand in cross-examining a prisoner. The prisoner is liable to be cross-examined and cannot refuse to answer any question on the ground that it would criminate him with respect to the offence for which he is being tried; but by section 1 (*f*) of the Criminal Evidence Act, 1898[9]:—

[1] 8 Edw. VII. c. 67, s. 30.

[2] Evidence Amendment Act, 1851 (14 & 15 Vict. c. 99). As the witness is called by his opponent he cannot be cross-examined by him, and the latter will be bound by his answers, however unfavourable.

[3] Evidence Act, 1877 (40 & 41 Vict. c. 14), s. 1.

[4] Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36). See *Charnock* v. *Merchant*, [1900] 1 Q. B. 474.

[5] *R.* v. *Warren* (1909), 25 Times L. R. 623.

[6] 61 & 62 Vict. c. 36, s. 1 (b).

[7] *R.* v. *McNair* (1909), 25 Times L. R. 228.

[8] *R.* v. *Rhodes*, [1899] 1 Q. B. 77.

[9] 61 & 62 Vict. c. 36.

"A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i.) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or the nature or conduct of the defence is such as to involve imputations[1] on the character of the prosecutor or the witnesses[2] for the prosecution; or

(iii.) he has given evidence against any other person charged with the same offence."[3]

But where the cross-examination addressed to the prisoner tends to show that he is guilty of the offence charged, it cannot be excluded merely on the ground that it also shows that he had previously been guilty of other offences.[4]

It has been held that a prisoner who denies his guilt—even with emphasis offensive to the prosecutor—does not make an imputation on the character of the prosecutor within the meaning of this section.[5] Otherwise, every prisoner whose defence is a denial of the facts would be liable to cross-examination "to credit." The imputation must be that the conduct of the prosecutor or a witness for the prosecution outside the evidence given by him is such that he cannot be believed on his oath.[6] An allegation that the prosecutrix in a charge of rape consented to the deed is not such an imputation;[7] but an assertion that a witness for the prosecution is the person who is really guilty of the offence will lay the prisoner open to cross-examination to credit.[8] In other words, so long as the prisoner contents himself with setting up a defence, which, if believed, entitles him to an acquittal, his character cannot be attacked.

The rules as to admitting the evidence of husbands or wives against their spouses differ considerably in civil and criminal proceedings. In civil cases, a husband or wife is fully competent to give such evidence,[8] but neither can be compelled to disclose any communication made to the witness by the spouse during marriage.[9]

1 See the remarks of Lord Alverstone, noted in 69 J. P. (Journal) at p. 556.
2 *R.* v. *Marshall* (1899), 63 J. P. 37.
3 *R.* v. *Hadwen*, [1902] 1 K. B. 882.
4 *R.* v. *Chitson*, [1899] 2 K. B. 945.
5 *R.* v. *Rouse*, [1904] 1 K. B. 184; *R.* v. *Grout* (1909), 26 Times L. R. 60.
6 *R.* v. *Preston*, [1909] 1 K. B. 568, 575.
7 *R.* v. *Sheean* (1908), 72 J. P. 232.
8 16 & 17 Vict. c. 83; 32 & 33 Vict. c. 68, s. 3.
9 *O'Connor* v. *Majoribanks* (1842), 4 Man. & G. 435; *Monro* v. *Twistleton* (1802), Peake, Add. Cas., 219, 221.

In criminal cases, however, the rule is very different. The husband or wife of a prisoner can now be called as a witness for the defence in all cases, if the prisoner so wishes.[1] The prosecution cannot comment on the fact that he or she could have been called but was not,[2] although the Court has a discretion to make such a comment if it thinks fit.[3]

But a wife cannot give evidence against her husband[4] except in the following cases, that is, in criminal proceedings instituted under :—

(a) the Vagrancy Act, 1824 ;[5]

(b) the Offences against the Person Act, 1861,[6] sections 48 to 55 ;

(c) the Criminal Law Amendment Act, 1885 ;[7]

(d) the Prevention of Cruelty to Children Act, 1904 ;[8]

(e) Part II. of the Children Act, 1908 ;[9]

(f) the Punishment of Incest Act, 1908 ;[10] or

(g) when the proceeding is criminal in form only, and is really instituted to enforce a civil right, such as to compel the repair of a highway ;[11] or

(h) whenever at common law husbands and wives could be compelled to give evidence against one another,[12] *e.g.*, when a husband was charged with assaulting his wife, but not if he is charged with libelling her.[13]

When a competent witness is in the box ready to give evidence, he must as a rule answer every question put to him which bears upon the issue to be decided. But there are certain classes of questions which he will not be forced to answer unless he pleases, and certain others which he will not be allowed to answer unless some third person permits him to do so.

Such classes are five in number :—

(i.) Questions which tend to incriminate the witness. No person will be compelled to answer any question, the answer

[1] 61 & 62 Vict. c. 36, s. 4.
[2] *Ib.*, s. 1 (*b*).
[3] *R.* v. *Rhodes*, [1899] 1 Q. B. 77.
[4] Or a husband against his wife.
[5] 5 Geo. IV. c. 83.
[6] 24 & 25 Vict. c. 100.
[7] 48 & 49 Vict. c. 69.
[8] 4 Edw. VII. c. 15.
[9] 8 Edw. VII. c. 67, s. 27.
[10] 8 Edw. VII. c. 45, s. 4 (4).
[11] 40 & 41 Vict. c 14, s. 1.
[12] *Lord Audley's Case* (1631), 3 St. Tr. 401 ; 61 & 62 Vict. c. 36, s. 4 (1).
[13] *R.* v. *Lord Mayor of London* (1886), 16 Q. B. D. 772.

to which he swears [1] will tend to expose him to a criminal charge or to a penalty or forfeiture.[2]

(ii.) Questions tending to prove that the witness has committed adultery.[3] But if the witness has already denied the adultery in examination in chief, cross-examination intended to disprove that denial is freely admitted.

(iii.) Questions the answer to which would disclose the subject-matter of communications between husband and wife.[4] The communication must be one which is made during marriage; a third person who overheard it, however, can be compelled to say what he heard.[5]

(iv.) Counsel, solicitors and their clerks are not entitled to disclose communications made to them by their clients, without the consent of the latter.[6] Nor will the client himself be compelled to disclose them. This privilege exists whether the communication were made for the purposes of litigation or not.[7] But information obtained by a legal adviser or by the client at his direction is only protected from disclosure if it is obtained for the purpose of actual or contemplated legal proceedings.[8] The privilege can be waived by the client, but not by the legal adviser.[9] The privilege is one which protects legal advice only. No other communications in professional or religious confidence are privileged.[10]

(v.) Questions intended to elicit disclosures prejudicial to the public interest. A witness will not be compelled to answer questions if his answers will tend to disclose affairs of State,

[1] See *Webb* v. *East* (1880), 5 Ex. D. at p. 112; *Spokes* v. *Grosvenor Hotel*, [1897] 2 Q. B. 124.

[2] 14 & 15 Vict. c. 99, s. 3; *R.* v. *Boyes* (1861), 1 B. & S. 311; *Ex parte Reynolds* (1882), 20 Ch. D. 294. It is doubtful whether a witness can refuse to answer because it would criminate his or her spouse: *R.* v. *The Inhabitants of All Saints, Worcester* (1817), 6 Maule & S. 194; *Cartwright* v. *Green* (1803), 8 Ves. 405, 409; and see further Powell on Evidence, 9th ed., pp. 221—228.

[3] 32 & 33 Vict. c. 68, s. 3.

[4] As to civil actions, see 16 & 17 Vict. c. 83, s. 3; as to criminal prosecutions, see 61 & 62 Vict. c. 36, s. 1 (*d*).

[5] *R.* v. *Smithies* (1832), 5 C. & P. 332; *R.* v. *Simons* (1834), 6 C. & P. 540.

[6] See *Bolton* v. *Liverpool Corporation* (1833), 1 Mylne & K. 88, 94.

[7] *Greenough* v. *Gaskell* (1833), 1 Mylne & K. 98, 101.

[8] *Wheeler* v. *Le Marchant* (1881), 17 Ch. D. 675; and see *Minet* v. *Morgan* (1873), L. R. 8 Ch. 361; *In re London and Northern Bank, Hoyle's Case* (1902), 50 W. R. 386.

[9] *Wilson* v. *Rastall* (1792), 4 T. R. 753, 759; cf. *Watson* v. *Jones*, [1905] A. C. 480.

[10] *Normanshaw* v. *Normanshaw* (1893), 69 L. T. 468; *Wheeler* v. *Le Marchant* (1881), 17 Ch. D. at p. 681; and see on the general principle *Jones* v. *Great Central Ry. Co.*, [1910] A. C. 4.

which public interest demands should not be disclosed.[1] And the same rule applies to parliamentary[2] and judicial[3] proceedings. Nor will he, in a civil case, be allowed to give evidence which outrages decency.[4] But in criminal and divorce cases, if the evidence is relevant to the issue, it is admissible, however indecent and loathsome it may be.

As a rule, a party may, if he thinks fit, rest his case upon the evidence of a single witness who deposes to the facts put forward as establishing his case. Thus the prisoner is frequently the only witness called for the defence. But if one party is clearly in a position to call other evidence which corroborates the story of the witness, and does not call it, the jury may draw the conclusion that such corroborative evidence is not produced because the story is untrue. As a rule, however, it is entirely a matter for the jury to decide which set of witnesses is telling the truth, and in coming to a decision they must not merely count heads: it is their duty to weigh the evidence.

In two cases, however, the Court, though not insisting upon the production of corroborative evidence, will advise the jury not to act upon the evidence of a single witness, and will not itself so act if sitting without a jury. One case is where the only evidence against a prisoner who is charged with an offence is that of an accomplice;[5] the other where only the claimant to property which forms part of a deceased person's estate is called to substantiate his claim.[6] In such cases the jury, if properly directed, may nevertheless accept such uncorroborated testimony, and their verdict will not be disturbed.

In one civil action (breach of promise of marriage[7]) and in two quasi-civil proceedings (affiliation[8] and the removal of paupers[9]) the Legislature

[1] *R.* v. *Hardy* (1794), 24 St. Tr. 199, 815.
[2] *Plunkett* v. *Cobbett* (1804), 5 Esp. 136.
[3] *Sykes* v. *Dunbar* (1779), 2 Selw. N. P. 1015.
[4] *R.* v. *The Inhabitants of Sourton* (1836), 5 A. & E. 180; and see Annual Practice (1910), vol. i., 507.
[5] *R.* v. *Stubbs* (1855), Dears. 555; *R.* v. *Tate*, [1908] 2 K. B. 680; *R.* v. *Beauchamp* (1909), 73 J. P. 223; *R.* v. *Kirkham* (1909), *ib.*, 406.
[6] *In re Garnett* (1886), 31 Ch. D. 1; *Rawlinson* v. *Scholes* (1898), 79 L. T. 350; but see *Vavasseur* v. *Vavasseur* (1909), 25 Times L. R. 250.
[7] 32 & 33 Vict. c. 68, s. 2.
[8] 35 & 36 Vict. c. 65, s. 4.
[9] Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), s. 34.

has enacted that corroborative evidence is essential to establish the point at issue. In six cases corroborative evidence is also made necessary in order to secure the conviction of an accused person :—

(i.) Treason.[1]

(ii.) Perjury.[2]

(iii.) Personation at elections.[3]

(iv.) The offences created by sections 2, 3 and 4 of the Criminal Law Amendment Act, 1885.[4]

(v.) The offence created by section 9 (1) of the Motor Car Act, 1903.[5]

(vi.) Offences where the unsworn testimony of children is admissible and the prosecution relies upon such testimony.[6]

The corroborative evidence is usually that of a witness, but not necessarily so. Thus, letters passing between the parties may be the best confirmation of the witness's story; and real evidence may be available for the same purpose. Mere silence, or not answering letters, is not corroboration, unless the person who does nothing is under a duty to speak;[7] for the best answer to an impertinent letter is most often not to notice it.

Besides calling witnesses, the parties may desire to prove facts by producing documents. Thus, if a person is charged with obtaining goods by false pretences which were contained in a letter which he wrote to the prosecutor, that letter must be produced (unless its absence is satisfactorily accounted for) and proved to have been written by the person charged.[8] Again, although a marriage need not necessarily be proved by the production of the marriage certificate together with evidence of the identity of the parties named in it, in most cases it is the cheapest and most convenient way of doing so.

Documents are of two kinds—public and private. Public documents are such as are made for the purpose of enabling

[1] 7 & 8 Will. III. c. 3, ss. 2, 4. For the exceptions see 39 & 40 Geo. III. c. 93; 5 & 6 Vict. c. 56, s. 1; 11 Vict. c. 12.

[2] This is the only case where corroboration is required by common law. See *R.* v. *Yates* (1841), Car. & M. 132; *R.* v. *Muscot* (1713), 10 Mod. 192.

[3] 6 & 7 Vict. c. 18, s. 88; 35 & 36 Vict. c. 33, s. 24.

[4] 48 & 49 Vict. c. 69.

[5] 3 Edw. VII. c. 36.

[6] Prevention of Cruelty to Children Act, 1904 (4 Edw. VII. c. 15), s. 15 (1); Children Act, 1908 (8 Edw. VII. c. 67), s. 30; see *ante*, pp. 302, 303.

[7] See *Bessela* v. *Stern* (1877), 2 C. P. D. 265; *Wiedemann* v. *Walpole*, [1891] 2 Q. B. 534.

[8] See *post*, p. 1089.

the public to use or refer to them with regard to any matters which it is the judicial or quasi-judicial duty of a public officer to inquire into and record.[1] Such documents as Royal Proclamations, Acts of Parliament, by-laws, judicial records, registers of births, marriages and deaths, probates and letters of administration, are public documents.

To avoid the risk of loss or destruction of public documents which might be incurred if they had to be produced in Court whenever the facts to which they refer have to be proved, most of them have, by various statutes, been made provable by examined or certified copies, which, if properly authenticated, have all the probative effect of the original documents.[2] Office copies of judicial records have also been made admissible in evidence.[3] But whenever the existence or genuineness of the record itself is in dispute, then the original must be produced.[4]

Even if a public document which is relevant to the issue exists, it cannot always be put in evidence at the trial. The head of the department in whose custody it is, may refuse to allow its production on the ground that the public interest would suffer, and, if this is done, no other way of proving its contents will be permitted.[5]

The method of proving private documents depends upon two considerations :—

(i.) Is the document more than thirty years old?

(ii.) If less than thirty years old, is it required by law to be attested?

A document thirty years old can be proved by simply producing it from a proper custody.[6] Thus, an expired lease

[1] See *Sturla* v. *Freccia* (1880), 5 App. Cas. at p. 643; *Mercer* v. *Denne*, [1905] 2 Ch. 538.

[2] Evidence Amendment Act, 1851 (14 & 15 Vict. c. 99), s. 14; Documentary Evidence Acts, 1845 (8 & 9 Vict. c. 113), s. 3; 1868 (31 & 32 Vict. c. 37), Schedule; 1882 (45 & 46 Vict. c. 9), s. 3; 1895 (58 Vict. c. 9); Evidence (Colonial Statutes) Act, 1907 (7 Edw. VII. c. 16), s. 1; Post Office Act, 1908 (8 Edw. VII. c. 48), ss. 8, 9, 74.

[3] Order XXXVII., r. 4.

[4] *R.* v. *Cox* (1864), 4 F. & F. 42; *R.* v. *Boynes* (1843), 1 Car. & K. 65; and see on the whole question, Powell on Evidence, 9th ed., pp. 248—253.

[5] *Dawkins* v. *Lord Rokeby* (1875), L. R. 7 H. L. 744; *In re Joseph Hargreaves*, [1900] 1 Ch. 347; *Admiralty Commissioners* v. *Aberdeen Steam Trawling Co.*, [1909] S. C. 335.

[6] *Meath* v. *Winchester* (1836), 3 Bing. N. C. 183; *Doe* v. *Samples* (1838), 8 A. & E. 151, 154.

over thirty years old can be proved by producing it from the keeping of either the lessor or the lessee; for it may or may not have been handed over at the expiration of the lease. If such a document is not in a proper custody, it must be proved in the same way as a document less than thirty years old.

Ancient documents, which are part of the transaction to which they relate as distinguished from being a mere narrative of the transaction, not only prove themselves, but are evidence of the truth of the statements contained in them.[1]

If the document is less than thirty years old, and is not required by law to be attested, all that the party need do is to produce the original (unless secondary evidence is admitted), duly stamped, if necessary, and to prove the handwriting.[2] If such a document is required to be attested, then he must call at least one attesting witness to prove the execution,[2] but if all the attesting witnesses are dead or insane or without the jurisdiction, it will be sufficient to call evidence to prove the handwriting of any one of the witnesses. The rule is the same both in civil and criminal proceedings.[3]

Where one party desires the production of documents which are in the possession of his opponent, he must give him notice to produce them. The latter may, however, refuse to comply with the notice on similar grounds to those on which a witness can refuse to answer questions. Moreover, in civil actions, if the document is stated to be written "without prejudice," it cannot be produced without the consent of the other side, for it would be unjust if negotiations for a settlement could not be conducted freely and without the risk of conversations and letters being given in evidence against the negotiating parties at the trial in the event of the negotiations failing.[4]

It is the province of the judge to decide what is the true meaning of the words of a written document, though the

[1] *Malcolmson* v. *O'Dea* (1862), 10 H. L. Cas. 593; *Heath* v. *Deane*, [1905] 2 Ch. 86. See also *Roe* v. *Rawlings* (1806), 7 East, 279.

[2] In the case of the proof of a will in solemn form, the executor can be forced to call both witnesses: *Coles* v. *Coles* (1866), L. R. 1 P. & D. 70.

[3] Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 26; Criminal Evidence Act, 1865 (28 Vict. c. 18), s. 7.

[4] *Wallace* v. *Small* (1830), Moody & M. 446; *Paddock* v. *Forrester* (1842), 3 Man. & Gr. 903; *Oliver* v. *Nautilus S.S. Co.*, [1903] 2 K. B. 639.

jury, if there is one, will find any matters of fact necessary to enable the judge to do so.

The judge always starts with the assumption that the writer meant what he wrote. He will give to ordinary English words their ordinary English meaning, unless there is evidence to go to the jury that the words in this particular case bear some unusual and peculiar meaning. He will give to technical words their technical meaning. To a word which has both a strict and proper meaning, and also a loose popular meaning (*e.g.*, "lands," which may include leaseholds; "children," which may include illegitimate children), he will give the strict and proper meaning, unless it be clear that the writer used the word in its loose popular meaning. Above all, he will construe the document as a whole, not divorcing isolated passages from their context, but giving due weight to every part.[1]

Again, evidence is either Direct or Circumstantial. Direct evidence goes straight to the matter in issue. Thus an eye-witness who saw A. shoot B. gives direct evidence when, on the trial of A. for the murder of B., he relates in the box what he saw and heard. But circumstantial evidence is merely evidence of certain facts from which the matter in issue can be inferred. Thus persons have been convicted even of murder without the evidence of a single eye-witness, the prosecution having proved facts which showed clearly that it must have been the prisoner and no one else who murdered the dead man.

Evidence is also either primary or secondary. Thus the person who saw what happened, the deed which conveys the land in question, and the knife used to kill the deceased are each and all primary evidence. No better evidence could be obtained. Secondary evidence, on the other hand, shows on the face of it that there is other evidence superior to itself. Thus, a witness may not have seen the occurrence and can merely repeat what another told him. This is called

[1] See *ante*, pp. 67, 68; and Powell on Evidence, 9th ed., pp. 542—581.

"hearsay" and, as a rule, is not admissible. Again, a document may be tendered, which is only a copy of the deed in question, or a witness may say that he saw the original and remembers its contents. So, too, a surveyor may produce a plan of the place in question, or a model of the house or other thing material to the issue which the jury have to try. In all these cases, the evidence does not profess to be the best that is obtainable; it confesses that it is not original.

As a general rule, the use of one kind of evidence will not prevent a party making use of another. In criminal charges, it is usual to call both direct and circumstantial evidence. Neither excludes the other. Nor will oral evidence exclude either documentary or real, and real evidence will not prevent oral or documentary evidence being adduced. But it frequently happens that a fact can only be proved by documentary evidence. Judgments and other records, conveyances and many contracts must be in writing, and even when writing is not required by law, the parties will not be allowed to give evidence to impugn a document which they have drawn up as a record of the final agreement to which they have come. Secondary oral evidence—that is, evidence of what a person would say if he were called as a witness—is generally inadmissible even when the person in question is dead or abroad. In certain cases, however, the rule is relaxed. Secondary documentary evidence is, as a rule, admitted upon proof that the document cannot be produced to the Court. A witness can either state his recollection of the document, or produce a copy of it and prove that he made the copy and compared it with the original. The latter is the better and more usual course.

It often happens that a material witness is not willing to come and give evidence, or a material document is in the possession of a person who will not produce it unless compelled. In such cases, the attendance of the witness can be compelled by serving him with a *subpœna*. If he is required to produce documents as well, then he is served with the kind of *subpœna* called *duces tecum*. But it does not follow in every case that he is bound to show the documents, and, as we have seen, there are many questions which a witness may decline to answer. The Court can always set aside a *subpœna*, which has not been obtained *bonâ fide* for the purpose

of the trial.[1] In civil cases where a witness is abroad, or too ill to travel, or will go abroad before the date of the trial, arrangements can be made to have his evidence taken on commission or by letters of request.[2] In criminal cases, however, there is hardly any provision for taking such evidence, apart from the depositions taken at the petty sessions[3] and at the coroner's inquest.[4]

## III.

When all the evidence is before the Court the question then arises, What weight is to be given to it? The value or cogency of any particular piece of evidence is quite a different question from its admissibility.[5] Until a relevant fact has been proved in the legitimate way, it is impossible to tell whether it will assist or convince the Court. It is for the judge or jury to consider the evidence given on both sides and to weigh it in the light of all the circumstances before coming to a conclusion.

The whole object of evidence is to create a conviction in the mind of a reasonable and practical man. He will not require more than what is called a "moral certainty," but he will not act upon a mere possibility. He will base his conviction upon the facts proved and the inferences which can be legitimately drawn from those facts. Belief should always be the reasonable result of facts; a theory should be the true explanation of actual experience.

When, in any proceeding, relevant evidence has been properly called, it by no means follows that the judge or jury will accept it as true. Different kinds of evidence have very different probative force. Everyone will accept as genuine a record properly authenticated and produced from the proper public office; but no day passes without the clear statements of a witness as to facts which must be within his knowledge being challenged and disbelieved.

The law often permits a fact to be proved in several ways, but wherever one way is the usual and accepted mode of

[1] *R.* v. *Baines*, [1909] 1 K. B. 258.
[2] See Odgers on Pleading and Practice, 6th ed., p. 289.
[3] Indictable Offences Act, 1848 (11 & 12 Vict. c. 42).
[4] Coroners Act, 1887 (50 & 51 Vict. c. 71), ss. 4, 5. Other cases occur under the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), s. 6; the Extradition Acts, 1870 and 1873 (33 & 34 Vict. c. 52, s. 14; 36 & 37 Vict. c. 60, s. 5), and the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 691.
[5] See the judgment of Jessel, M. R., in *Taylor* v. *Witham* (1876), 3 Ch. D., at pp. 607 *et seq.*

proof, it would be unwise to adopt any other method unless it is clear from the circumstances that it would be unreasonable to expect the party to prove the fact in the usual way.

We proceed to take the various classes of evidence which we have just dealt with.

Direct evidence differs greatly from circumstantial evidence. In the former case, the Court has only to be satisfied that the evidence is true—the conclusion must follow. If A. says "I saw B. strike C.," then he is either telling the truth or else he is mistaken or lying. But where a number of circumstances are relied upon from which the point to be decided can be inferred, then not only has the truth of each link in the chain to be tested, but the Court must also consider whether the chain of evidence is strong enough—whether the desired inference can properly be drawn from it; if a prisoner is to be convicted of a crime on circumstantial evidence, all the facts must be consistent with his guilt.

It is difficult to estimate the relative probative force of direct and circumstantial evidence. It is always more satisfactory to have the direct evidence of an eye-witness, but when the circumstantial evidence fits in together and raises a violent presumption of the prisoner's guilt, circumstantial evidence is as cogent as direct evidence.[1]

Oral, documentary and real evidence depend so much on the circumstances of each case that general remarks must always be subject to exception. Oral testimony is, as a rule, limited to the lifetime of the witness. The non-attendance of any person is always conclusively explained by showing that he is dead, but the continued existence of documents and things is so much to be expected, that, even if they are shown no longer to exist, it is still open to the other side to comment upon their disappearance and to suggest that they have been destroyed on purpose.

Judges as a rule prefer to have documents, juries like to

[1] See *R.* v. *Burdett* (1820), 4 B. & Ald. at p. 161; and *Loveden* v. *Loveden* (1810), 2 Haggard's Consistory Court Cases, at p. 2.

see witnesses. Documents can always be used to check and explain the evidence of a witness. For instance, if the parties have written to one another about the matter before the dispute arose, any statements thus made are more likely to be true than those made by the witnesses, who know that what they say will influence the result, and who may be biassed by the feelings which the dispute has engendered. On the other hand, witnesses can show emotion, can explain or contradict themselves, add to a statement or correct it. But the written word stands unaltered and unalterable, unless it can be shown to be a forgery or to have been tampered with; this must be established by oral evidence, generally by an "expert witness."

Real evidence is of great use, if it is properly brought before the Court. It is, however, open to the charge that juries are apt to exaggerate its importance. The production of a pistol or a blood-stained garment influences their minds unfavourably to the prisoner before anything has been proved to connect it with the charge.

The absence of real evidence, such as stolen goods, which can be readily produced may give rise to comment or suspicion.[1] Real evidence which cannot be brought into Court may in a proper case be inspected by the judge and jury before or during the trial.

The chief cause of a miscarriage of justice is the acceptance of the story of witnesses which is not true or the rejection of the story which is true. A witness who gives evidence on oath is in an unusual situation, and this naturally affects his demeanour, which is the first, though not the most important, consideration to be borne in mind in determining whether he is telling the truth or not.

Deliberate perjury is not so common as is usually supposed. Witnesses, who are strong partisans and therefore not willing to say anything that will tell against their own side, will stop short of inventing something which tells in its favour. Moreover, a witness may have observed very inaccurately, and consequently he is telling a story untrue in fact, but which he believes to be true. Or by reason of physical or mental disability he may be unable to express his meaning, and is assumed to be shuffling and evasive when in truth he is struggling to be accurate. Even the demeanour of a witness may easily lead the observer astray. A "bad

[1] *R.* v. *Hunt* (1820), 3 B. & Ald. 566; *R.* v. *Francis* (1874), L. R. 2 C. C. R. 128.

witness" is often truthful; a "good witness" may be accustomed to give evidence, and may have learnt exactly what to say and to do in the interests of the party calling him.

But the decision of the question at issue rarely rests on the evidence of one man. His story must be compared with inherent probabilities and with the story of the other witnesses on the same side; it may also be checked by the documents in the case and the admitted facts. The evidence of the witnesses on the other side must be treated in the same manner, and then both sets of evidence must be compared together. If the witnesses on one side agree in all material points both with one another and with the documents and things put in evidence and also with the admitted facts, then the jury may safely accept their evidence as true.

Documents, on the other hand, are less liable to mislead. The point of great importance in correspondence is whether the dispute had begun when the letter in question was written. What the parties wrote when no dispute was contemplated will not, as a rule, be so composed as to colour the truth. Documents should always come from a proper source, for nothing is more suspicious than a document found during a dispute in a place where no ordinary individual would have expected to find it, or one which is produced by a person who has no business to have it in his possession.

Primary evidence is generally better than secondary evidence. Take, for instance, hearsay. What a person told a witness may be correctly stated, but many circumstances may diminish its value. The witness may not have heard properly, or he may have misunderstood or since forgotten what was said, or he may even be inventing the conversation. The person who is put forward as the authority for the statement is not before the Court and there is nothing by which the Court can judge of his credibility or accuracy.[1] A written statement taken at the time by a reliable person is naturally better than another's mere recollection; the danger of admitting secondary oral evidence is so great that it is excluded in all but eight cases where, from the nature of the facts, the persons in question cannot possibly give evidence.[2] Secondary documentary evidence is more readily admitted,

[1] See the remarks of Cave, J., in *Scott* v. *Sampson* (1882), 8 Q. B. D. at pp. 506, 507.
[2] See Powell on Evidence, 9th ed., pp. 302—359.

for the same considerations do not apply. An accurate copy of a document is almost as valuable as the original.

The "burden of proof" is the duty which lies on each party to establish his case. The burden of proving the general or main issue in the proceedings rests, in a criminal trial, on the prosecution: if the prosecution calls no evidence, the prisoner is entitled to an acquittal. So, too, in civil cases, the general burden lies upon that party who will lose the case unless he calls some evidence. In criminal cases, therefore, the prosecution always begins: in civil cases, generally, but not always, the plaintiff.

But as the case proceeds, the burden of proof may be shifted. A minor fact in issue may fall to the other side to prove, or the prosecution may have established sufficient facts to cast upon the defence the duty of rebutting the inferences drawn from them; that is called establishing a *primâ facie* case. Civil cases differ from criminal trials in this respect—that the tribunal can decide the former on a balance of probabilities, but a prisoner's guilt must be established beyond reasonable doubt before he can be found guilty. In either case, however, the party upon whom the *onus* lies, may succeed in proving his case in such a manner that the other party is reasonably called upon to destroy it or explain it away. He need not do so unless he likes. He may call evidence or he may simply argue that the Court should not draw the inference, *e.g.*, because the witnesses are not truthful or that the evidence is too weak for the jury to act upon.

Some facts need not be proved at all. The course of the seasons, the constitution of this country, the counties and their general relative position, are all so well known that the Court, as it is said, "takes judicial notice" of them.

In other cases, proof of the surrounding circumstances will be sufficient to establish a *primâ facie* case and to throw upon the defence the burden of disproving the inferences drawn from the circumstances. Where an injury is caused to the plaintiff by some occurrence which does not happen in the natural course of events without negligence on the part

of somebody, the Court will assume that the person who had it in his power to prevent the mischief is responsible for it, unless he can show that the occurrence took place without any fault on his part; and the plaintiff has only to prove that it did take place. *Res ipsa loquitur.*[1]

If a man is found in possession of goods recently stolen, this is sufficient *primâ facie* evidence that he either stole them or received them knowing them to have been stolen, and the *onus* lies on him to prove that he came by them honestly.[2] How recent the possession must be to raise such an inference, depends on the nature of the goods. Again, if goods be delivered to a carrier to be conveyed to a certain place and on the arrival of the carrier there they are not to be found, it lies upon him to prove that their loss is not due to any negligence on his part.[3]

So if a passenger is injured by a collision between two trains, which are both at the time exclusively under the management of the same railway company, this is *primâ facie* proof of negligence, and it lies upon the defendant company to rebut it if possible.[4] And there are many other cases in which the facts speak for themselves.[5]

But where a man was knocked down and killed on a level crossing by a passing train, and there was nothing to show how or why he came to be upon the line, it was held that no *primâ facie* case had been established; for the facts were equally consistent with negligence on his part and negligence on the part of the railway company.[6] So where a passenger was killed in a railway carriage by the explosion of a parcel of fireworks which had been illegally brought into the carriage by a fellow passenger, it was held that, as a railway company is not an insurer of its passengers,[7] the *onus* lay on the plaintiff to prove negligence on its part, that it was not the duty of the railway company to search every parcel carried by a passenger, and that, as no evidence had been given to show that there was anything in the appearance of the particular parcel to suggest danger, the railway company was not liable.[8]

And not only can the main issue in the proceedings be established by *primâ facie* evidence, but many subsidiary questions of fact which arise incidentally in the course of the trial may be disposed of in the same way. Thus, if it is proved that a letter properly addressed to A. with the postage prepaid was posted and has not been returned through the "Dead Letter Office," it will be taken to have reached A., unless he proves the contrary.[9]

[1] See *ante*, p. 483.
[2] *R.* v. *Langmead* (1864), L. & C. 427; *R.* v. *McMahon* (1875), 13 Cox, 275.
[3] *Phipps* v. *New Claridge's Hotel* (1905), 22 Times L. R. 49.
[4] *Carpue* v. *L. & B. Ry. Co.* (1844), 5 Q. B. 747, 751.
[5] *Byrne* v. *Boadle* (1863), 2 H. & C. 722.
[6] *Wakelin* v. *L. & S. W. Ry. Co.* (1886), 12 App. Cas. 41; and see *Pomfret* v. *Lancashire and Yorkshire Ry. Co.*, [1903] 2 K. B. 718; *McDonald* v. "*Banana*" *Steamship*, [1908] 2 K. B. 926; *Marshall* v. *Owners of Steamship* "*Wild Rose*," [1909] 2 K. B. 46, (1910) 103 L. T. 114 (H. L.); and *ante*, p. 491.
[7] See *ante*, p. 647.
[8] *East Indian Ry.* v. *Kalidas Mukerjee*, [1901] A. C. 396.
[9] *Walthamstow U. D. C.* v. *Henwood*, [1897] 1 Ch. 41.

So, too, the "Law List"[1] and the "Medical Register"[2] are *primâ facie* proof that the persons whose names appear in them are duly qualified to practise as a solicitor or medical man respectively. Again, a certified copy of an entry in the "Register of Newspaper Proprietors" at Somerset House is *primâ facie* evidence of all matters and things contained in it.[3]

It is, however, not always necessary that a party should bring evidence to establish the facts upon which he bases his claim or defence. His task is often lightened by—

(i.) Admissions;

(ii.) Presumptions; and

(iii.) Estoppels.

If a party who has to establish a fact can show that it has been admitted by his opponent, he need do no more. The fact will be taken as proved, unless his opponent can explain away or destroy his admission. Admissions are either formal or informal. Formal admissions may be made on the pleadings, or in answer to interrogatories or by a party's counsel or solicitor during the litigation.[4] A prisoner cannot as a rule make any formal admission other than a plea of "guilty." Informal admissions may be made in any form whatever, in correspondence or conversation or even by conduct, and at any time, whether litigation is contemplated or not. Negotiations held, or letters written, "without prejudice" cannot, in civil cases, be proved or relied on in any way as admissions.

A party is bound by admissions made by himself, or by a person who is his agent to make them, or by a person through or under whom he claims if made while such person had the same right or title.[5] But as an infant, lunatic or person of unsound mind cannot be bound by his own admissions, so he cannot be bound by any admission made by anyone else on his own behalf.[6]

A general agent has authority to do everything that such an agent usually does in the class of business in which he is engaged, and consequently can bind his principal by any admissions he may have made in the usual course of his dealing.[7] But a particular agent can bind his principal

[1] 23 & 24 Vict. c 127, s. 22.
[2] 21 & 22 Vict. c. 90, s. 27.
[3] 44 & 45 Vict. c. 60, s. 15.
[4] As to "confessions," see Powell on Evidence, 9th ed., pp. 104 *et seq.*
[5] Stephen's Digest of the Law of Evidence, Art. 17.
[6] See, for example, *Stanton* v. *Percival* (1855), 24 L. J. Ch. 369.
[7] Such as a partner. See *Farrar* v. *Hutchinson* (1839), 9 A. & E. 641; and *ante*, p. 839.

by an admission, only if it be made in the course of his employment on the particular matter upon which he is engaged, and also within the scope of his authority therein. A person who fills a representative character can make admissions binding upon the persons whom he represents, provided they are made while he sustains that character, and then he personally is not bound by them. In any other case he alone is bound.

It often happens that if a party proves certain facts, the law will presume the existence of another fact. This presumption[1] is not conclusive; the fact will stand as proved until the opposite party succeeds in disproving it: that is, a presumption shifts the burden of proof.

Thus, if a man leaves home under circumstances which make it probable that he would, if alive, let his relatives or friends know what had become of him, the law will presume that he is dead, if for seven years his friends neither hear from him nor of him. But the law will not presume that he died at any particular moment within that period. Where two or more persons, such as husband and wife, perish in the same catastrophe, the law will not presume that any one of them survived the other or others.[2]

Again, the law will presume that a public officer acted with due authority in the capacity which he professed to have. Thus, even on a trial for murder, it was held that proof of the mere fact that a man had acted as a constable was sufficient proof that he was one.[3] So, too, the law will not presume guilt or fraudulent or immoral motives. A transaction will always be upheld, unless fully proved to have been done with a criminal or fraudulent intent. But whenever a party to an action has been proved to be a wrongdoer, the Court will presume everything against him. Thus, if a man takes away another's jewel, in any action against him in respect of that taking the jewel will be presumed to have been of the finest quality, unless he produce it, because his own wrongful act is the cause of its value being unknown.[4] There are other presumptions, such as those relating to lost grants,[5] and bills of exchange,[6] which will be found dealt with in other parts of this work.

In some cases a party to an action will not be allowed to set up, or to attempt to prove at the trial, allegations which are directly contrary to that which has already been decided against him, or to that which he has himself deliberately

[1] This word is used here in the sense of "rebuttable presumption of law" or "*præsumptio juris.*"

[2] *In re Bruce* (1910), 26 Times L. R. 381.

[3] *R.* v. *Gordon* (1789), 1 Leach, 515.

[4] *Armory* v. *Delamirie* (1721), 1 Smith, L. C., 11th ed., 356; *Williamson* v. *Rover Cycle Co.*, [1901] 2 Ir. R. 619.

[5] See *ante*, pp. 565, 566, 573, 580, 581.

[6] See *ante*, p. 809.

represented to be the fact. He is said to be estopped. Such an estoppel is binding not only on the original parties, but also on all who claim through or under them. It must be specially pleaded in a defence or in any subsequent pleading.

There are three kinds of estoppel—by record,[1] by deed,[2] and by conduct, with the last of which alone we are here concerned.

If A. by word or conduct induces B. to believe that a certain state of things exists, and B. in that belief acts in a way in which he would not have acted unless he so believed, and is thereby prejudiced, then A. cannot, in any subsequent proceeding between himself and B. or any one claiming under B., be heard to deny that that state of things existed.[3] But A. will not be estopped from averring the truth in any other proceeding. The estoppel only arises in favour of some person whom A. has induced by word or conduct to do or abstain from doing some particular thing.

The words may be written or spoken; the conduct may be any act, omission or neglect, provided it be an omission to do something which A. ought to do—the neglect of some legal duty which A. owes B.; provided also that such omission or neglect misleads B. and misleads him to his prejudice. Even silence may be sufficient where there is a duty to speak and where silence will create an erroneous impression which causes B. to alter his position for the worse.

[1] See *ante*, p. 662, and *post*, p. 1315.

[2] See *ante*, p 670.

[3] This third kind of estoppel was formerly called estoppel *in pais* (*i.e.*, in the country). The full phrase was "*in pais dehors* the instrument," *i.e.*, matters outside the four corners of any deed or record. Estoppel by conduct is a clearer phrase.

## Chapter X.

### PROCEEDINGS AFTER VERDICT.

*Sentence.*

Except where the punishment is death, our law does not rigidly fix the sentence to be passed on any convicted criminal, but leaves a large discretion to the judge. Only a maximum penalty is, as a rule, prescribed, and the judge may award any sentence which he thinks fit below that maximum. He will give due weight to any recommendation to mercy made by the jury. He may inflict fine, or imprisonment, or penal servitude within the limits prescribed, and in a few cases also whipping. If he decides to send the prisoner to penal servitude, it cannot be for less than three years. If he decides to pass a sentence of imprisonment, it cannot, as a rule, be for more than two years. In certain cases he may order a prisoner under the age of twenty-one to be detained in a Borstal institution, and such detention must be for at least one and not more than three years.[1] A convicted criminal, who is found by the jury, or who admits himself to be, an habitual criminal, may in addition to a sentence of penal servitude be ordered to be detained as an habitual criminal for not less than five, nor more than ten, years.[2] In almost every other case no minimum is fixed by the law, and the judge may pass as light a sentence as in his judicial discretion he thinks right; he may order the prisoner to enter into recognizances to come up for judgment when called upon so to do, or he may discharge him under the provisions of the Probation of Offenders Act, 1907.[3]

It is one of the most difficult tasks which a judge has to perform, to determine the proper sentence to be inflicted on a

[1] See *post*, pp. 1103, 1104.
[2] This is called "preventive detention;" see *post*, p. 1105.
[3] 7 Edw. VII. c. 17; see *post*, pp. 1102, 1103.

particular prisoner. The punishment must be made not only to "fit the crime," but also to fit the criminal; it should be reformatory as well as deterrent, remedial and not vindictive. The previous history of the prisoner, his education and environment, and all the surrounding circumstances which attended his criminal act, should be carefully considered, and the punishment eventually awarded should be one which will build up, and not break down, his character, and strengthen whatever element of good may be left in him. Too short a sentence is often mistaken leniency, as the good influences of prison discipline have then no time in which to operate.

With such ends in view, the Legislature has recently passed several statutes, the more important of which we will proceed to notice briefly. Youthful offenders, under certain circumstances, may be sent to a reformatory or to an industrial school, or placed under the care of a probation officer. Probation officers are now appointed by the justices of the peace for each petty sessional division; they may be of either sex; it is their duty to keep an eye on the youthful offender or any other person who is placed in their charge and to keep him away from bad company and evil surroundings, and, so far as is possible, to bring every good influence to bear upon him. "Where any person has been convicted on indictment of any offence punishable with imprisonment, and the Court is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment, or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."[1] The Court

[1] Probation of Offenders Act, 1907 (7 Edw. VII. c. 17), s. 1 (2).

may also order the offender to pay compensation and costs. The recognizance may bind him not to associate with thieves and other undesirable persons, or to abstain from intoxicating liquor for a specified time.[1] The probation officer reports to the Court on the behaviour of the offender, and if the report is unsatisfactory, the offender will be brought before the Court again and sentenced for the original offence, or otherwise dealt with.[2]

Another important attempt towards the reformation of criminals was made by the Prevention of Crime Act, 1908,[3] which recognised and put on a statutory basis what is known as "the Borstal system." That Act provides that "where a person is convicted on indictment of an offence for which he is liable to be sentenced to penal servitude or imprisonment, and it appears to the Court—

(a) that the person is not less than sixteen nor more than twenty-one years of age; and

(b) that, by reason of his criminal habits or tendencies, or association with persons of bad character, it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime;

the Court may, in lieu of passing a sentence of penal servitude or imprisonment, pass a sentence of detention under penal discipline in a Borstal institution for a term of not less than one year nor more than three years."[4] In such an institution the prisoners are not kept in solitary confinement; they are drilled and taught a trade, and every effort is made to fit them, both morally and physically, for honest work at the end of the period of detention.

Before passing such a sentence, the Court must consider any report or representations by or on behalf of the Prison Commissioners as to the

[1] Probation of Offenders Act, 1907 (7 Edw. VII. c. 17), s. 2.

[2] Courts of summary jurisdiction have even greater power; they may, without proceeding to conviction, either discharge the offender conditionally on his entering into a recognizance and hand him over to a probation officer, or discharge him unconditionally, although a technical offence has been proved.

[3] 8 Edw. VII. c. 59.

[4] *Ib.*, s. 1 (1).

suitability of the case for treatment in a Borstal institution ;[1] and it must be satisfied that the character, state of health, and mental condition of the offender, and the other circumstances of the case, are such that he is likely to profit by the instruction and discipline suggested.

Every person sentenced to detention in a Borstal institution will, on the expiration of the term of his sentence, remain for a further period of six months under the supervision of the Prison Commissioners.[2] At Borstal, Lincoln, Aylesbury (for females), Wormwood Scrubbs, and several other selected prisons the full Borstal system is in operation, and lads under sentence of detention will be sent to one or other of these prisons. Prisoners who are sentenced to less than twelve months are not sent to such an institution, because it is found that, generally speaking, little can be effected in less than that time ; but at every local prison a juvenile-adult class has been formed for lads between the ages of sixteen and twenty-one, irrespective of length of sentence, and the methods of the Borstal system are applied in these classes as far as the length of the sentences and the size of the classes permits. Aliens are not, as a rule, selected for the Borstal system, unless good reasons exist in any particular case and no expulsion order has been recommended by the Court. Other prisoners not regarded as suitable subjects for the Borstal system are :—

(a) Young prisoners whose previous character is good and who might suffer more by association with recidivists and "hooligans" than they would gain by the special training.

(b) Lads in bad health or of poor physique, who are unfit for drill and hard work.

(c) Lads who in a reformatory school or when previously under Borstal treatment have had a chance of reform and have failed to profit by it.

If an alien has been convicted of a crime, the Court may recommend the Home Secretary to expel him from the kingdom, and at the same time either sentence him to a period of imprisonment or merely order him to be detained until the pleasure of the Home Secretary be known.[3] If an expulsion order be made and the alien disobeys it, he will be deemed to be a rogue and vagabond, and may be imprisoned for three months with hard labour.[4]

An habitual drunkard, who has been convicted of a crime,

[1] This report is usually made by the governor of the prison in which the prisoner is confined while awaiting trial. See *R.* v. *Watkins* (1910), 74 J. P. 382.

[2] 8 Edw. VII. c. 59, s. 6 (1).

[3] 5 Edw. VII. c. 13, s. 3.

[4] *Ib.*, ss. 3 (2), 7 ; see *ante*, p. 225.

may, subject to certain conditions, be sentenced to be detained in a certified reformatory for inebriates.[1]

Greater severity is properly shown towards hardened offenders. Any person, who—

(a) since he was sixteen years old has been three times convicted of a crime (not including the one on which he awaits sentence), and "is leading persistently a dishonest or criminal life," or

(b) has on a previous occasion been found to be an habitual criminal and sentenced as such,

is deemed to be an habitual criminal.[2] In other words, an habitual criminal is one who has adopted crime as a profession and whose ordinary mode of life is criminal, and not one whose offences, though frequent, are of merely an occasional or trivial character.

Where such a person is convicted on indictment of a crime, and subsequently admits that he is, or is found by the jury to be, an habitual criminal, the Court may pass a sentence of penal servitude and, in addition, if it is "of opinion that by reason of his criminal habits and mode of life it is expedient for the protection of the public that the offender should be" further detained, it may add a period, not exceeding ten, nor less than five years, of what is called "preventive detention."[3]

The property in stolen goods, as we have seen,[4] does not as a rule pass from the owner, but even if it has done so in consequence of a sale in market overt or otherwise, it re-vests on the conviction of the offender.[5] In all cases of theft the Court has power, if the prisoner is convicted,[6] to save the owner from the trouble and uncertainty of a law suit by ordering the goods to be restored to him on such terms as it thinks just. This is called a "restitution order." But since the Criminal Appeal Act, 1907, the re-vesting of the property and the operation of such an order are suspended

[1] Inebriates Act, 1898 (61 & 62 Vict. c. 60), ss. 1, 2; *R.* v. *Briggs*, [1909] 1 K. B. 381; and see *ante*, p. 223.

[2] 8 Edw. VII. c. 59, s. 10 (2).

[3] *Ib.*, s. 10 (1).

[4] See *ante*, pp. 20, 792, 793.

[5] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24 (1). This does not apply to goods obtained by fraud or other wrongful means short of larceny: s. 24 (2).

[6] If acquitted, the prisoner has a right to retain any goods which he is charged with stealing or receiving which were in his possession.

for ten days after the conviction and, if notice of appeal is given within that time, then the suspension subsists until the appeal is disposed of.[1]

A restitution order does not, however, operate as an adjudication upon the ownership of the goods in question; the Court simply orders them to be handed to the owner. Whether the Court grants an order or not, it is still open for anyone who claims to be the real owner to bring an action in a civil court to establish his right, and the order has no bearing whatever on the merits of that claim.

If the prisoner is convicted of felony the Court may, upon the application of any person aggrieved, immediately after the conviction "award any sum of money, not exceeding £100, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt"[2] and is recoverable accordingly. A similar power exists where a prisoner is bound over under the Probation of Offenders Act, 1907, but the limit in this case is £10.[3]

At the end of the trial the Court usually makes an order that the costs of the prosecution shall be paid out of the funds of the county or county borough in which the offence was alleged to have been committed,[4] but the expenses of witnesses who are only called as to the prisoner's character are not paid unless the Court makes a special order to that effect.[5] The officer of the Court assesses the amount of such costs, but in doing so he must have regard to the regulations made by the Home Secretary.[6]

If witnesses for the defence have been called at petty sessions and bound over to appear at the trial, their expenses will be paid in the same manner as if they were witnesses for the prosecution, unless expressly disallowed by the Court at the trial. The costs of the defence will be paid out of public funds in one case only—where the prisoner has been granted a certificate for legal aid under the Poor Prisoners' Defence Act, 1903.[7]

In all cases of indictable offences, the Court now has power, in addition to any punishment it may inflict, to order a prisoner who has been convicted to pay the costs of the prosecution.[8] Payment of such costs, as a rule, falls primarily on the public funds, but the county or county borough can recover the amount of such costs from the prisoner when such an order has been made on him. The Court also has power to impound any money found on the prisoner when arrested and apply it towards payment of those costs.[9]

In certain cases, a prisoner who has been acquitted can obtain an order

[1] 7 Edw. VII. c. 23, s. 6.
[2] 33 & 34 Vict. c. 23, s. 4.
[3] 7 Edw. VII. c. 17, s. 1 (3).
[4] Costs in Criminal Cases Act, 1908 (8 Edw. VII. c. 15), ss. 1, 4. The same order can be made where the prisoner for some reason is not tried on any charge for which he was committed: *ib.*, s. 7.
[5] *Ib.*, s. 1 (4).
[6] *Ib.*, s. 5.
[7] 3 Edw. VII. c. 38; see *ante*, p. 1049.
[8] 8 Edw. VII. c. 15, s. 6 (1).
[9] *Ib.* s. 6 (4).

from the Court that the prosecutor shall pay the costs of the defence.[1] These cases are :—

(i.) indictments or informations for libel ;

(ii.) offences under the Corrupt Practices Acts ;[2]

(iii.) offences against the Merchandise Marks Acts, 1887—1894 ;[3]

(iv.) any case where the justices have declined to commit for trial and the prosecutor has insisted on being bound over under the Vexatious Indictments Act, 1859,[4] to prefer an indictment against the accused.

*Appeal.*

After verdict has been given the prisoner can no longer move to quash the indictment.[5] But he can at any time after the verdict and before judgment move in arrest of judgment on any objection which appears on the face of the record. It is still open to the judge, if he thinks fit,[6] to state a special case, as was frequently done in the days before the Court for Crown Cases Reserved was abolished. But now the most usual course is for a convicted person to appeal to the Court of Criminal Appeal, which came into existence on April 19th, 1908.[7]

Prior to this date a prisoner convicted on indictment had no right of appeal on a question of fact, nor as to the amount of his sentence. And as to any point of law, nothing in the nature of an appeal was open to him, unless he could induce the judge to state a case, *i.e.*, to state the facts on which the point of law arose, for the opinion of the Court for Crown Cases Reserved. This the judge might refuse to do; and if he did refuse, no Court had power to compel him to do so.

The Court of Criminal Appeal consists of the judges of the King's Bench Division of the High Court.[8] The Lord Chief

[1] 8 Edw. VII. c. 15, s. 6 (2). The justices at petty sessions in dismissing a charge of an indictable offence may, if they think the charge was not brought *bonâ fide*, order that the prosecutor shall pay the costs of the defence. If these costs amount to more than £25, an appeal lies to quarter sessions.

[2] Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102) ; Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51).

[3] 50 & 51 Vict. c. 28 ; 54 & 55 Vict. c. 15 ; 57 & 58 Vict. c. 19.

[4] 22 & 23 Vict. c. 17.

[5] See *ante*, p. 1062.

[6] Criminal Appeal Act, 1907 (7 Edw. VII. c. 23), s. 14 (4) ; *R.* v. *Turner*, [1910] 1 K. B. 346. The Court of Criminal Appeal has now power to "require a case to be stated" (s. 20 (4)) ; formerly it could only be reserved at the will of the judge.

[7] 7 Edw. VII. c. 23, ss. 1, 23 (3). Writs of error and motions for new trials are abolished : s. 20 (1).

[8] *Ib.*, s. 1 (1), as amended by the Criminal Appeal (Amendment) Act, 1908 (8 Edw. VII. c. 46), s. 1.

Justice is the President. Three judges form a quorum, and the number of judges present must be an uneven one. The Court can sit in two or more divisions, if the Lord Chief Justice so directs. Unless the Court thinks it desirable to deliver separate judgments in any case where a question of law is to be determined, only one judgment is delivered and that by the president of the Court or by such member of the Court as the president may direct.[1]

This Court has jurisdiction to hear appeals in the case of a conviction on any indictment wherever tried, or in the case of a conviction on a criminal information or on a coroner's inquisition, or in any case where a person is dealt with by a Court of quarter sessions as an incorrigible rogue under the Vagrancy Act, 1824.[2] It has no jurisdiction "in the case of convictions on indictments or inquisitions charging any peer or peeress, or other person claiming the privilege of peerage, with any offence not now lawfully triable by a Court of Assize,"[3] nor in the case of indictments for non-repair or obstruction of highways, public bridges, or navigable rivers.[4]

The prisoner has an unfettered right of appeal on any question of law.[5] From the verdict of the jury on any question of fact, or from the decision of the Court on any question of mixed law or fact, the prisoner can appeal provided he obtains either the leave of the Court of Criminal Appeal, or a certificate from the judge who tried the case that it is a fit case for appeal.[6] On the hearing of the appeal in such cases the Court may quash the conviction on any of the grounds on which a verdict may be set aside in civil cases,[7] *e.g.*, that the verdict is unreasonable, or that it cannot be supported on the evidence laid before the Court, or that on any ground there has been a miscarriage of justice.[8] It may

[1] 7 Edw. VII. c. 23, s. 1 (5).
[2] 5 Geo. IV. c. 83.
[3] 7 Edw. VII. c. 23, s. 20 (2); *R.* v. *Hausmann*, [1909] W. N. 198.
[4] *Ib.*, s. 20 (3). Appeal in such cases lies as if the conviction were a judgment in a civil action.
[5] *Ib.*, s. 3 (a).
[6] *Ib.*, s. 3 (b).
[7] See *post*, pp. 1324—1327.
[8] *Ib.*, s. 4. In such cases the prisoner has a right to be present at the hearing of the appeal if he so wishes: s. 11 (1), and *R.* v. *Dunleavey*, [1909] 1 K. B. 200.

enter a verdict of "Not guilty," thus preventing a person, now adjudged to be innocent, remaining recorded as a criminal. Lastly, the prisoner has a right to appeal against the sentence passed upon him, provided he first obtains the leave of the Court of Criminal Appeal;[1] but on such an appeal the Court may, if it thinks fit, quash the sentence appealed against and inflict a more severe one.[2] This power exists when the prisoner has pleaded guilty, as well as when he has been found guilty by the jury.[3] A person sentenced to a term of preventive detention may—with leave—appeal against his sentence.[4] The Court may grant the appellant bail pending the hearing of the appeal.[5]

Provisions are inserted in the Act to prevent unnecessary and frivolous appeals. In the first place, as we have seen, leave to appeal is, in most cases, necessary; and again, the Registrar of the Court has power to bring up a case for hearing at once. Moreover, the detention of a prisoner pending appeal does not count as a part of the sentence passed upon him by the lower Court; and, as we have just seen, the Court can increase the sentence—a power which in a proper case it will use. The Court has also power to dismiss an appeal where no substantial miscarriage of justice has resulted from the sentence passed in the inferior Court, though the appellant may be right in point of law. But where a substantial miscarriage of justice has occurred, the Court must quash the conviction and cannot order a new trial, though the prisoner may be obviously guilty.

The proviso in section 4 (1) of the Act does not enable the Court to "substitute itself for the jury and find the facts which are necessary to support the conviction." The proviso is intended to apply to a case in which the evidence is such that the jury must have found the prisoner guilty if they had been properly directed. It does not apply where the evidence leaves it in doubt whether they would have so found."[6]

Where, therefore, any question of fact has been tried by the jury, the

[1] 7 Edw. VII. c. 23, s. 3 (c); *R.* v. *Sidlow* (1908), 72 J. P. 391.
[2] *Ib.*, s. 4 (3).
[3] *R.* v. *Ettridge*, [1909] 2 K. B. 24.
[4] Prevention of Crime Act, 1908 (8 Edw. VII. c. 59), s. 11.
[5] 7 Edw. VII. c. 23, s. 14 (2).
[6] *Per cur.* in *R.* v. *Dyson*, [1908] 2 K. B. at p. 457.

Court will not reverse the conclusion to which it has come, unless no jury could reasonably have come to that conclusion. Where the evidence before the jury bears both ways, and there was material upon which the jury, if they believed it, could properly find a verdict of Guilty, the Court will refuse to disturb it.[1]

Unless a Government department or a private prosecutor undertakes to support the conviction, the duty of appearing for the Crown rests on the Public Prosecutor. The conduct of the appeal lies on the appellant, but the Court has power, if his means are insufficient, to assign him counsel and solicitor or counsel only at any stage of the appeal.[2] In cases where the appeal is against sentence only, no legal aid will be assigned unless special cause is shown.[3] In order that the whole facts should be properly laid before the Court at the hearing of the appeal, it is provided that upon the trial of any person at quarter sessions or assizes the evidence, the arguments and decision upon points of law, the summing up of the judge, the verdict of the jury, and, if the prisoner be found guilty, the speeches and evidence as to his character, and the sentence, must be taken down by the official shorthand writer, so that an accurate record of the proceedings can be laid before the Court of Criminal Appeal, if an appeal is entered.[4] This provision, however, is only directory and not mandatory, so that if the trial takes place in the absence of a shorthand writer, the trial is valid—if the prisoner is acquitted, he cannot be tried again; if he is convicted, his conviction cannot be quashed on that ground.[5]

The Act and the Rules made under it provide machinery for the production before the Court of the evidence given at the trial and also of fresh evidence where admissible.[6] Thus, the judge or chairman who presided at the trial must furnish a copy of his notes, and also send a report on the case generally or on any point arising in it.[7] The registrar is charged with the duty of procuring in proper form all documents, exhibits

[1] Unless fresh evidence is forthcoming in support of the defence: see *post*, p. 1112.
[2] 7 Edw. VII. c. 23, s. 10.
[3] *R.* v. *Crawley* (1908), 72 J. P. 270.
[4] *Ib.*, s. 8.
[5] *R.* v. *Elliott* (No. 2) (1909), 100 L. T. 976; *R.* v. *Rutter* (1909), 73 J. P. 12.
[6] *Ib.*, ss. 8, 9, 15, 16 and Criminal Appeal Rules, 1908.
[7] *Ib.*, s. 8; rules 14, 15.

and things put in evidence in the Court below.[1] And the Court has power to

"(a) order the production of any document, exhibit, or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case ; and

(b) if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of Court before any judge of the Court or before any officer of the Court or justice of the peace or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court ; and

(c) if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application ; and

(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in manner provided by rules of Court for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner so far as they think fit to adopt it ; and

(e) appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case ;

and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the Court : Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial." [2]

The judge of the Court below can make orders as to the custody of the documents and exhibits in the case.[3] Copies of the documents or exhibits can be obtained by the appellant or respondent on payment according to a fixed scale.[4] Provision is also made for the summoning of witnesses,[5] and the prosecutor, although he may have declined to support a conviction or

[1] 7 Edw. VII. c. 23, s. 15 (1) ; rules 20, 32.
[2] *Ib.*, s. 9.
[3] Rule 8.
[4] Rule 39.
[5] Rule 40.

sentence, must give such assistance in his power as the Court or Director of Public Prosecutions may require of him.[1]

Fresh evidence can only be adduced by leave of the Court. The names of the witnesses and the nature of the evidence must be stated on the application for such leave,[2] and should strictly be before the Court on affidavit when the application is made.[3] The leave is limited to the witnesses or documents thus named, and the appellant is not entitled to adduce any other evidence.[4]

Leave will not generally be given, unless the omission to call the witnesses at the trial is satisfactorily explained.[5] Thus, it would require very exceptional circumstances for the Court to permit a prisoner to give evidence on the appeal, for he had the opportunity of doing so on his trial in the Court below.[6] The witnesses will give their evidence in open court, or, if the Court so directs, before an examiner appointed for the purpose.[7] Upon such evidence the Court will in a proper case quash the conviction[8] or reduce the sentence,[9] but cannot increase it.[10] The Court will not quash a conviction merely because evidence was discovered after the trial, proving that a material witness for the prosecution had been previously convicted of criminal offences, unless the convictions were of such a nature as to affect the witness's credibility.[11]

The Court relies on the judge's notes and the shorthand writer's transcript of his notes, which are verified by affidavit. Neither the prisoner nor his counsel, if he had one, can be heard (although present at the trial) to dispute the accuracy of the notes unless serious grounds for doing so are shown.[12]

No costs are allowed on either side on the hearing and determination of an appeal or any proceedings preliminary or incidental thereto.[13] The expenses of the appellant, if legal aid is assigned, and of his attendance and of the attendance of witnesses by order of the Court, are paid in the same way as the expenses of a prosecution for felony.[14] There is no provision in the Act as to the expenses of supporting the conviction. The Public Prosecutor will pay out of the public funds granted to his office the expenses incurred in those cases in which he is represented ; a private prosecutor will pay them out of his own pocket.

[1] Rule 27.
[2] *R.* v. *Lovett* (1908), 1 Cr. App. R. 94.
[3] *R.* v. *Atkins* (1908), 24 Times L. R. 807.
[4] *R.* v. *Laws* (1908), 24 Times L. R. 630.
[5] *R.* v. *Martin* (1908), 1 Cr. App. R. 33 ; *R.* v. *Mortimer* (1909), 99 L. T. 204 ; *R.* v. *Hendry* (1909), 25 Times L. R. 635.
[6] *R.* v. *Malvisi* (1909), 73 J. P. 372 ; cf. *R.* v. *Kirkham*, *ib.* 406.
[7] 7 Edw. VII. c. 23, s. 9 (d), and Rules 40, 41.
[8] *R.* v. *Betridge* (1909), 73 J. P. 71.
[9] *R.* v. *Dickenson* (1909), 73 J. P. 287.
[10] 7 Edw. VII. c. 23, s. 9 *ad finem*.
[11] *R.* v. *Weaver* (1908), 1 Cr. App. R. 12.
[12] *R.* v. *Hampshire* (1908), 1 Cr. App. R. 212.
[13] 7 Edw. VII. c. 23, s. 13 (1). The costs of a case stated follow the same rule: 8 Edw. VII. c. 15, s. 9 (5).
[14] 7 Edw. VII. c. 23, s. 13 (2).

The creation of the Court of Criminal Appeal in no way affects the exercise of the prerogative of mercy, which from time immemorial has been vested in the Crown acting under the advice of the Home Secretary. Application can be made to the Home Secretary at any time after conviction. He may, if he thinks fit, pardon the offender altogether or mitigate the sentence by means of a "conditional pardon." The prerogative of mercy is frequently exercised in cases where the prisoner has been sentenced to death and the jury have recommended him to mercy. The judge in such a case must pass sentence of death in spite of the recommendation, but he always forwards the recommendation to the Home Secretary. The Home Secretary may, however, if he thinks fit, refer the case to the Court of Criminal Appeal, or he may submit to that Court any particular point of law arising in any case for its opinion.[1] The effect of an unconditional pardon is to absolve the prisoner from further punishment and from any disqualifications incurred by his conviction; but it is not equivalent to an acquittal or to the quashing of a conviction by the Court.

[1] 7 Edw. VII. c. 23, s. 19; *R.* v. *Smith*, [1909] 2 K. B. 756; *R.* v. *Dickman* (1910), 26 Times L. R. 640.

# BOOK V.—PART III.

## CIVIL PROCEDURE.

## Chapter XI.

### COMMENCEMENT OF CIVIL PROCEEDINGS.

### *Right of Action.*

Adjective Law is in the present day divided into two distinct branches. We have already dealt with the first branch — Criminal Proceedings — by means of which the state enforces its positive commands and punishes those who disobey them. We now turn to Civil Proceedings—by means of which the state enforces payment of a debt, or compels a wrongdoer to compensate those whom he has injured. In this second branch of our subject we hear no longer of a prosecutor who prefers an indictment, which may lead to the conviction and punishment of the person accused. It is now a plaintiff who brings an action, which will end in a judgment for either the plaintiff or the defendant. Substantive Law tells us when a plaintiff has a right to bring an action; Adjective Law teaches us how such an action should be brought.

When a crime has been committed, every citizen has a right to prosecute the offender; for all are concerned in the suppression of crime. But the case is different where the wrong committed is only a tort or a breach of contract. Here also the state imposes a penalty or "sanction" on those who disobey the law; but only the particular members of the community who are injured by such disobedience have vested in them the power to draw down the sanction on the wrongdoer. This power is called a right of action. A plaintiff has a right

of action whenever he has a claim to some advantage enforceable in the law courts of the state. Whenever the defendant has violated some right of the plaintiff's, or has neglected his duty in some way which has injured the plaintiff, or has broken his contract with the plaintiff, the plaintiff has a good *primâ facie* right of action.

But it does not follow that he should at once have recourse to the law courts. There are many matters to be considered before litigation is actually commenced. In the first place, he should be satisfied that a complete cause of action ever vested in him, and, if so, whether it has been postponed, or extinguished, or barred by any Statute of Limitation; or whether he is estopped from suing. He should also consider whether or not any preliminary notice is requisite, and if so, to whom and when it should be given. Further, before issuing the writ, he must decide the nature of his claim, and in what court it should be presented, and for what relief he will ask. He must select the parties by and against whom respectively the action should be brought, and determine what causes of action he may join; for all these matters must be stated clearly on his writ or summons. He must show that a right of action existed and was vested in him, before he commenced the suit. If more persons than one be made plaintiffs or defendants, a right of action must be established at the trial in every plaintiff and a liability in every defendant. If special damage be part of the gist of the action, litigation must be delayed until such damage has accrued. If the service of any notice be a condition precedent to the defendant's becoming liable—whether a notice to quit, notice of dishonour, notice of assignment, or notice under section 14 of the Conveyancing Act, 1881,[1]—such notice must be given before litigation is commenced. If the case falls within the Statute of Frauds, 1677,[2] or section 4 of the Sale of Goods Act, 1893,[3] it may be necessary to postpone the issue of a writ until a memorandum sufficient to satisfy those statutes comes into

[1] 44 & 45 Vict. c. 41.
[2] 29 Car. II. c. 3.
[3] 56 & 57 Vict. c. 71.

existence.[1] Or it may be that the parties intended that no right of action should accrue till after the happening of some event which has not yet occurred. If so, the cause of action is not complete. Again, the right of action may have been extinguished by merger, surrender or release, or satisfied by payment, or lost through "laches,"[2] or postponed by credit having been given for a specified period,[3] or by the acceptance of a bill of exchange or promissory note payable at some future day.

Whenever a statute gives a right to a sum of money and provides no means of recovering it, the remedy is by action.[4] If a statute expressly gives a right of action, the plaintiff must take care to comply with all the provisions of the statute which vests in him that right. In some cases, for instance, the consent of a judge or of the Attorney-General must be obtained before commencing proceedings.

The plaintiff must also consider whether or not any kind of notice is necessary before suing. Whether formal notice of action be strictly requisite or not, it is only fair to the proposed defendant that some reasonable notice should be given of the intended proceedings, or some demand made for pecuniary compensation, or some request for the performance of that which he has wrongfully left undone, so as to give him the opportunity of repairing the omission or of making an amicable settlement. Moreover, such a step may be highly expedient on other grounds. Thus in an action for wrongfully depriving the plaintiff of his goods, the fact that the goods have been demanded and that the defendant has refused to give them up will be clear proof of the conversion. So also in an action for libel or slander, the fact that the opportunity of retractation and apology has been given to the defendant by the plaintiff will greatly strengthen the plaintiff's case. In some cases it is also necessary before commencing an action against constables and other officers to make a demand for the warrant under which they committed the act complained of, and to afford them the opportunity of tendering amends.[5]

Again, the parties, by their own agreement, may have fixed a time, before which no right of action should accrue to either. Thus a person who contracts to do work and supply materials, may expressly agree to complete the whole and be paid when the work is done, and not till then. In any such case the period of completion is fixed by the agreement of the parties as the period of payment, and nothing can be obtained sooner. So too, it may have been the intention of the parties that no right of action should

[1] *Bill* v. *Bament* (1841), 9 M. & W. 36; *Lucas* v. *Dixon* (1889), 22 Q. B. D. 357.
[2] See *post*, p. 1123.
[3] See the remarks of Patteson, J., in *Lamb* v. *Pegg* (1832), 1 Dowl. at p. 447.
[4] *Richardson* v. *Willis* (1872), L. R. 8 Ex. 71.
[5] 24 Geo. II. c. 44, s. 6. In most cases, however, notice of action is now unnecessary: 56 & 57 Vict. c. 61, s. 2.

accrue until some condition precedent shall have been performed.[1] If, however, a man binds himself to do certain acts which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent to those acts.

It cannot, however, be laid down as a universal rule that, where, by agreement, an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act in question has arrived. "If," said Lord Campbell, C. J.,[2] "a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. If a man contracts to execute a lease on and from a certain day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to an action at the suit of the person with whom he first contracted to sell and deliver them."[3] "All the cases admit," said Lord Alvanley in *Touteng* v. *Hubbard*,[4] "that where a party has been disabled from performing his contract by his own default, it is not competent for him to allege the circumstances by which he was prevented as an excuse for his omission." In cases of this kind, it may be that, by the contract to do an act on a future day, a relation, *e.g.*, that of betrothed persons,[5] is constituted between the parties, which raises an implied promise that, in the meantime, neither will do anything to the prejudice of the other inconsistent with that relation; and upon a breach of this implied promise an action will lie without waiting for the expiration of the time specified in the original contract.[6]

Any agreement, which altogether ousts the Courts of their jurisdiction (*i.e.*, which wholly debars the aggrieved party from coming for redress into a court of law), is void.[7] A question often arises whether an arbitration or award has been "made a condition precedent to an action, or whether the agreement to refer disputes is a collateral and independent one."[8] If it has been made a condition precedent, no action can be commenced until an arbitration has taken place and an award has been published. But the "question must be determined in each case by the construction of the particular contract, and the intention of the parties must of course be collected from its language."[8] In cases where there is first a covenant to pay, and secondly a covenant to refer, the covenants are deemed distinct

[1] *Cooper* v. *L. B. & S. C. Ry. Co.* (1879), 4 Ex. D. 88.
[2] *Hochster* v. *De La Tour* (1853), 2 E. & B. at p. 688.
[3] See *Roper* v. *Johnson* (1873), L. R. 8 C. P. 167; *Hickman* v. *Haynes* (1875), L. R. 10 C. P. 598; *Johnstone* v. *Milling* (1886), 16 Q. B. D. 460.
[4] (1802), 3 Bos. & P. at p. 302; and see *Geipel* v. *Smith* (1872), L. R. 7 Q. B. 404.
[5] See *Frost* v. *Knight* (1872), L. R. 7 Ex. 111.
[6] *Synge* v. *Synge*, [1894] 1 Q. B. 466. As to when the conduct of one party entitles the other to rescind the contract, see *ante*, pp. 753, 754.
[7] *Scott* v. *Avery* (1856), 5 H. L. Cas. 811.
[8] *Per cur.* in *Collins* v. *Locke* (1879), 4 App. Cas. at p. 689, distinguished in *Viney* v. *Bignold* (1887), 20 Q. B. D. 172; and see the judgment of Brett, J., in *Edwards* v. *Aberavon, &c., Society* (1876), 1 Q. B. D. at p. 596; and *Caledonian Insurance Co.* v. *Gilmour*, [1893] A. C. 85.

and collateral, and the plaintiff may sue on the covenant to pay, leaving the defendant to apply, if he thinks fit, under section 4 of the Arbitration Act, 1889,[1] to stay the action ; or, as it was put by Lord Cranworth in *Scott* v. *Avery*,[2] "If I covenant with A. to do particular acts, and it is also covenanted between us that any question which may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals. But if I covenant with A. B. that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then, until J. S. has made his award, and I have omitted to pay the sum awarded, my covenant has not been broken and no right of action has arisen."

As on the one hand parties cannot oust the jurisdiction of the Courts by their own agreement, so on the other hand they cannot, as a rule, by consent give a Court jurisdiction over matters which do not properly fall within it. All judges derive their authority from the Crown under some commission warranted by law, and they cannot act officially outside the scope of the powers thus confided to them.

Most of the above matters have been already dealt with under the head of Substantive Law ; but the rules as to the limitation of actions, parties, and joinder of causes of action clearly fall within the province of Adjective Law.

### *Limitation of Actions.*

The Legislature has thought fit to prescribe certain periods of time, at the expiration of which persons will be protected in the peaceable possession of property. It would be inequitable to permit the title of those in secure possession to be impugned by litigation, when lapse of time may have rendered evidence of their title difficult to obtain. The same principle has been applied to claims for debt or damages. Our law assists only those who are vigilant and who do not sleep upon their rights. It is in the interest of the State that all litigation should be commenced and determined within a reasonable time ; hence, if a man abstains for many years from claiming that which he now asserts to be his due, he may find his approach to the courts barred by some peremptory enactment.

[1] 52 & 53 Vict. c. 49. As to the procedure on such an application, see *ante*, p. 962.
[2] (1856), 5 H. L. Cas. at p. 848.

There is an important distinction, however, between the effect of the Statutes of Limitation in the case of actions to recover chattels and actions to recover land. In the case of actions to recover chattels the statutes do not destroy the plaintiff's title to the chattels after the period has elapsed, but only bar his remedy against the wrongdoer; whereas in the case of actions to recover land the effect of the Real Property Limitation Acts is not only to bar the remedy against the wrongdoer, but to confer on him a title to the land itself. From this rule a curious result follows. If during the period of limitation the person in possession of the land gives an acknowledgment in writing of the claimant's title or pays rent or interest to him or to any person through whom he claims, this will cause the period of limitation to recommence. But when the period of limitation has once expired, no subsequent acknowledgment or payment will have this effect; the claim cannot be revived, because the title to the land is now by the operation of the statute vested in the person in possession, and can only be re-vested in the former owner by a formal conveyance from him. It is otherwise in the case of chattels.

A defendant who relies on a Statute of Limitations must raise this defence by a special plea.[1] At the trial he must in the first place establish that the case falls within that statute; next he must show that the prescribed period has elapsed since the statute began to run against the plaintiff or his predecessor in title. It will then be open to the plaintiff to prove, if he can, that at the time when the statute began to run there was no one representing his interest capable of bringing an action to assert or defend that interest; for the operation of the statute is suspended during a period of disability. But as soon as the right to bring an action has vested in any one capable of suing, the statute begins to run, and it will not cease to run though a subsequent disability should arise.[2] If the person entitled to bring an action is, at the time when the cause of action first accrues, an infant or of

[1] Order XIX, r. 15.

[2] *Baird* v. *Fortune* (1861), 4 Macq. H. L. Cas. 127; *Penny* v. *Brice* (1865), 18 C. B. N. S. 393.

unsound mind, he may bring an action on a simple contract debt within six years, on a specialty within twenty years, of his coming of age or becoming sane.[1] If the defendant is, at the time when the cause of action first accrues, beyond the seas (*i.e.*, outside the British Islands and the Channel Islands), the action may be brought against him at any time within the prescribed period after his return from beyond the seas. The fact that the plaintiff does not know of his return will not prevent the statute running in his favour. Coverture is no longer a disability except where the marriage took place, and the wife's title accrued, before 1883.

We will deal first with cases in which the title to real property is involved.

By the Real Property Limitation Act, 1874,[2] an action to recover land or rent must be brought within twelve years after the right of action accrued either to the plaintiff or to any person through whom he claims.[3] But if during that period an acknowledgment in writing of the plaintiff's title has been made to him by the person in possession of the land or rent, the plaintiff's right will be deemed to have first accrued at the time when such acknowledgment was given.

When a plaintiff is entitled to an estate or interest in reversion or remainder, or any other future interest in land, the statute will not begin to run against him until his estate or interest vests in possession—provided the tenant for life or other person whose estate preceded the plaintiff's was then in possession or in receipt of the rents and profits of the land. In any other case the action must be brought within twelve years after the time when a right to sue accrued to such other person, or within six years after a right of action accrued to the plaintiff—whichever of these two periods is the longer.[2] Thus, if lands be settled on A. for life, with remainder to B., and a trespasser turns A. out of possession in 1910, A. cannot recover possession after 1922, but B. will have six years after the death of A. in which to bring an action, or if A. died prior to 1916, B. can still sue up to 1922.

If at the time at which the right of any person to sue for the recovery of land shall have accrued such person shall have been under any disability, such as idiotcy, lunacy or unsoundness of mind, then such person or any person claiming through him may sue for the land at any time within six

[1] 21 Jac. I. c. 16, s. 3, and 3 & 4 Will. IV. c. 42, ss. 3, 5; as amended by 19 & 20 Vict. c. 97, ss. 9—14.

[2] 37 & 38 Vict. c. 57, s. 2. This Act did not come into operation till January 1st, 1879.

[3] Only six years' arrears of rent can be recovered in the action: *Hickman* v. *Upsal* (1876), 4 Ch. D. 144.

years next after the time when the person to whom such right shall first have accrued shall have ceased to be under such disability or died, whichever of those events shall have first happened.[1] No time, however, is to be allowed on account of the absence beyond seas of the person entitled to sue, or of any one through whom he claims.[2] And the utmost time allowed for disabilities is limited to thirty years.[3]

A mortgagor will be barred at the end of twelve years from the time when the mortgagee took possession or from the last written acknowledgment by the mortgagee of the mortgagor's title.[4]

Money charged upon land by mortgage, judgment, lien or otherwise will be deemed to be satisfied at the end of twelve years if no interest has been paid and no acknowledgment in writing has been made in the meantime.[5]

The title of the Crown to any real property or chattel real (other than a franchise or liberty) will not be barred until the expiration of sixty years from the time when the Crown was last in possession, or from its last receipt of rent in respect thereof.[6]

Actions for the payment of money, whether as debt or damages, are mainly regulated by the Statute of Limitations of 1623.[7] But many modern Acts have been passed dealing with particular classes of actions. We can only state here the periods of limitation which occur most frequently in actual practice :—

In any action to which the Public Authorities Protection Act, 1893,[8] applies, a period of six months.

In any action brought under the Fatal Accidents Act, 1846,[9] twelve months.

In actions of slander where the words are actionable *per se*, two years.

In actions for trespass to the person, assault or false imprisonment, four years.

In all other actions of tort and on simple contracts, six years.

In an action to recover a legacy, twelve years.

In an action to recover money due under any recognizance,

[1] 37 & 38 Vict. c. 57, s. 3.
[2] *Ib.*, s. 4.
[3] *Ib.*, s. 5.
[4] *Ib.*, s. 7.
[5] *Ib.*, s. 8 ; see *Jay* v. *Johnstone*, [1893] 1 Q. B. 189.
[6] Crown Suits Acts, 1768 and 1861 (9 Geo. III. c. 18 ; 24 & 25 Vict. c. 62), and see *Emerson* v. *Maddison*, [1906] A. C. 569.
[7] 21 Jac. I. c. 16.
56 & 57 Vict. c. 61, s. 1 ; and see *post*, pp. 1124, 1125.
[9] 9 & 10 Vict. c. 93, s. 3.

deed, bond or other specialty, or to recover the personal estate of any intestate from his representatives or from the Crown, twenty years.

There is no limitation as to the time in which an action by the Crown must be brought for the recovery of money due to it, nor to an action against an express trustee who has been guilty of a fraudulent breach of trust, or who still retains the property which is the subject of the action or its proceeds, or has previously converted the same to his own use.

In other respects equity follows the law as to periods of limitation. Where, however, a party claims a purely equitable remedy, a delay much shorter than the period of limitation may bar his claim, for the Court insists upon prompt action. If, therefore, a party asks for specific performance or rescission of a contract or any other equitable relief after such a lapse of time as to convince the Court that he has slept upon his rights, it will refuse him relief on account of his "laches," as it is called.[1]

It is always important to mark carefully the precise point of time from which a Statute of Limitations runs. For example, where a tort consists of the breach of an absolute right which entitles the plaintiff to sue at once, the action must be brought within the statutory period after the date of the breach. But where special damage is an essential part of the cause of action so that the plaintiff cannot sue until he has sustained such damage, the time will not begin to run against him until such special damage has accrued.

In an action for trespass to land the statute begins to run from the date of the trespass, whether the owner of the land be aware of the trespass or not. Thus, where a trespasser wrongfully worked the mines of the plaintiff in consequence of which the plaintiff's land subsided, it was held that the statute commenced to run from the date of such wrongful working, and not from the subsidence; for the wrongful working was in itself a complete tort.[2]

[1] See *Lindsay Petroleum Co.* v. *Hurd* (1874), L. R. 5 P. C. 221; *Blake* v. *Gale* (1886), 32 Ch. D. 571; *Knight* v. *Simmonds*, [1896] 2 Ch. 294.

[2] *Spoor* v. *Green* (1874), L. R. 9 Ex. 99; *East Stonehouse U. D. C.* v. *Willoughby Bros., Ltd.*, [1902] 2 K. B. 318; *Walter* v. *Yalden*, [1902] K. B. 304.

In actions of detinue the time runs from the date of the demand of the goods by the plaintiff and the refusal of the defendant to deliver them up. In actions of conversion the time runs from the date of the sale or other act on which the plaintiff relies as amounting to a conversion, even if the plaintiff be ignorant of it,[1] unless such ignorance was owing to the fraud of the defendant in concealing the conversion, in which case the time does not run until the fraud has been discovered or might with reasonable diligence have been discovered.[2] Where the defendant has been guilty both of wrongful detention and of conversion, the plaintiff has a right to sue in either form of action. Hence, where goods had been bailed by the plaintiffs to the defendant for safe custody and the defendant wrongfully sold them, and the plaintiffs, more than six years afterwards, being ignorant of the fact that any such sale had taken place, demanded the return of the goods which the defendant refused, it was held that it was not too late for them to sue in detinue for the breach of the bailee's duty to deliver them up on request, although he would have been entitled if he had discovered the sale to sue immediately for a conversion of the goods.[3]

But where the act complained of does not give rise to an action of tort unless special damage be sustained in consequence, the time of limitation does not commence to run until that damage is in fact sustained. Thus, where the owner of coal mines worked them in such a way as eventually to cause the plaintiff's land to subside and his houses to be injured, it was held that the plaintiff was not barred from suing, although more than six years had elapsed since the last working, as the working itself was *primâ facie* lawful and only became tortious when it caused damage to the plaintiff.[4] So in an action of slander where the words themselves are not actionable without proof of special damage, time will not run until such damage is sustained.[5]

Where the tort is a continuing one, or recurs from time to time, then a fresh right of action arises on each occasion. Thus, in the case of false imprisonment, every continuance of the imprisonment is a new imprisonment, and gives rise to a fresh cause of action, and therefore the time of limitation commences to run from the last and not from the first day of the imprisonment.[6]

By the Public Authorities Protection Act, 1893,[7] every action brought against any person,[8] for any act done in pursuance or execution or intended execution of any Act of

[1] *Granger* v. *George* (1826), 5 B. & C. 149; *Trotter* v. *Maclean* (1879), 13 Ch. D. 574.
[2] *Ecclesiastical Commissioners for England* v. *N. E. Ry. Co.* (1877), 4 Ch. D. 845.
[3] *Wilkinson* v. *Verity* (1871), L. R. 6 C. P. 206; and see *Whitmore* v. *Humphries* (1871), L. R. 7 C. P. 1; *Miller* v. *Dell*, [1891] 1 Q. B. 468.
[4] *Backhouse* v. *Bonomi* (1861), 9 H. L. Cas. 503; *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127; cf. *West Leigh Colliery Co.* v. *Tunnicliffe*, [1908] A. C. 27.
[5] *Saunders* v. *Edwards* (1663), 1 Sid. 95.
[6] *Coventry* v. *Apsley* (1691), 2 Salk. 420; *Hardy* v. *Ryle* (1829), 9 B. & C. 603.
[7] 56 & 57 Vict. c. 61, s. 1.
[8] This term includes a body corporate.

Parliament or of any public duty or authority, or in respect of any neglect or default in the execution of any Act of Parliament, duty or authority, must be commenced within six months from the date of the act, neglect or default complained of, or in the case of a continuance of injury or damage within six months next after the ceasing thereof. The Act "is intended, as the title shows, to protect public bodies from expense when they are unsuccessfully sued in respect of acts done, or omitted to be done in the exercise of statutory powers or duties."[1] It applies to any action in either the King's Bench or the Chancery Division, whether for damages or an injunction or both.[2] An independent contractor, who is doing under contract, and for his own profit, work which a public authority is authorised to carry out under statutory powers, cannot claim the benefit of the statute.[3]

Thus, where a county council acquired and worked tramways under their statutory powers, and a passenger on one of their tramcars brought an action for damages against them for injuries sustained through a collision alleged to be due to the negligence of their servants, it was held that, as the writ was not issued till more than six months after the date of the alleged negligence, the defendants were protected by the Act.[4]

Again, where by an Act of 1883[5] the Municipal Corporation of Preston had become a harbour authority and had acquired statutory power to take tolls, and the plaintiffs' vessel ran aground in the harbour and sustained injury owing to the negligence of the harbour master in admitting her into the harbour where there was not sufficient water for her, it was held that the municipal corporation were entitled to the protection of the Act as it was retrospective in its operation when dealing with procedure, and the plaintiffs had not commenced their action within six months after the alleged negligence.[6] So, where a municipal corporation constructed and worked an electric railway under an order which was made in pursuance of the Light Railways Act, 1896,[7] and the plaintiff brought an action of negligence against the corporation for injuries received owing to one of the overhead wires breaking, it was held that the action was founded on a breach by the corporation of its duty as a public authority, and that, as

[1] *Per* Lindley, M. R., in *Fielding* v. *Morley Corporation*, [1899] 1 Ch. at p. 4.
[2] *Fielding* v. *Morley Corporation*, *supra*, and [1900] A.C. 133.
[3] *Tilling* v. *Dick, Kerr & Co.*, [1905] 1 K. B. 562.
[4] *Parker* v. *London County Council*, [1904] 2 K. B. 501.
[5] 46 & 47 Vict. c. cxv.
[6] *The Ydun*, [1899] P. 236.
[7] 59 & 60 Vict. c. 48.

the plaintiff had not brought his action within six months from the happening of the injury, the corporation was entitled to the protection given by the Act.[1]

The provisions of the Act with regard to the time within which an action must be brought apply to actions brought under the Fatal Accidents Act, 1846, notwithstanding the provision in section 3 of that Act that the action must be brought within twelve months.[2]

Except in the cases with which we have already dealt,[3] an action for breach of covenant, bond or other specialty must be commenced within twenty years after the right of action accrued or has been acknowledged in writing or by payment on account of principal or interest.[4] All actions upon simple contracts and actions for debt grounded upon any lending or contract without specialty must be brought within six years next after the cause of action arose,[5] or within six years of any acknowledgment by the party liable, or his agent, or of any part payment (on account of principal or interest) made by the party liable or his agent. The time begins to run as soon as the cause of action has accrued to the plaintiff or any one through or under whom he claims, even though he be not aware that a complete cause of action has vested in him.

A curious anomaly results from this rule in connection with actions arising out of negligence. Where there is no contract between the parties, the plaintiff cannot sue in tort until he has suffered damage; hence the statute does not begin to run until such damage has accrued. But where the defendant negligently performs his contract with the plaintiff, an action lies at once for this breach, although no damage has yet been caused thereby. Thus, if a vendor covenants that he has a good right to convey when he has not, his covenant is broken immediately upon the execution of the conveyance, and the purchaser could sue at once. He need not wait for any disturbance of his possession; for an eviction does not constitute the breach of the covenant in question, but is consequential damage arising therefrom.[6] It may, therefore, sometimes happen that such a purchaser never becomes aware of the defect in the title conveyed to him until after

[1] *Lyles* v. *Southend-on-Sea Corporation*, [1905] 2 K. B. 1.
[2] *Markey* v. *Tolworth, &c., Hospital District Board*, [1900] 2 Q. B. 454, *ante*, p. 70; and see *Williams* v. *Mersey Docks and Harbour Board*, [1905] 1 K. B. 804.
[3] *Ante*, p. 1122.
[4] 3 & 4 Will. IV. c. 42, ss. 3, 5. If an action be brought in England on an India bond, the period of limitation is twenty years, although in India it would be only three years: *Alliance Bank of Simla* v. *Carey* (1880), 5 C. P. D. 429.
[5] 21 Jac. I. c. 16, s. 3; 19 & 20 Vict. c. 97, s. 9.
[6] *King* v. *Jones* (1812), 5 Taunt. 401, 426.

the period of limitation has expired; whereas, if he could sue in tort, he would still have six years within which to take proceedings.

In actions brought under a penal statute[1] which does not contain any express direction to the contrary,[2] where the penalty is reserved to the King alone, the proceedings must commence within two years of the offence; where the penalty is divided between the King and a common informer, the informer must bring his action within one year, but the King can do so within two years of the offence.[3]

If a debtor has given an acknowledgment in writing admitting his liability either to the plaintiff or to any person through whom the plaintiff claims, or has made any payment to the plaintiff or such person on account of principal or interest, this will cause a second period of limitation to commence. Whether the debt be due on a record or by specialty or under a simple contract, the acknowledgment must be contained in a writing signed by the debtor or by his agent. In the case of a simple contract debt the acknowledgment must also be made to the creditor or his duly authorised agent,[4] and, further, it must be so worded that a promise to pay the debt can be reasonably inferred from it. Similarly, where there has been a part payment of the principal or interest due on a contract, such part payment must be made under circumstances from which an acknowledgment of liability and a promise to pay the balance can be inferred—otherwise it will not take the case out of the Statutes of Limitation;[5] for the payment of a certain sum of money does not necessarily involve an admission that further sums are payable, still less any promise to pay them.

But the effect of an acknowledgment is confined to cases of debt, and has no application to actions of tort or to claims for unliquidated damages in actions of contract.

An acknowledgment must be made before the action is commenced. Where several persons are liable jointly on a contract, and one of them

[1] See *ante*, pp. 944—946.

[2] 11 & 12 Vict. c. 43, s. 36.

[3] 31 Eliz. c. 5, s. 5; but see *Thomson* v. *Lord Clanmorris*, [1900] 1 Ch. 718.

[4] See, as to recognizance and specialty debts, 3 & 4 Will. IV. c. 42, s. 5; as to simple contract debts, Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 13.

[5] *Taylor* v. *Hollard*, [1902] 1 K. B. 676; and see the judgments of Brett, L. J., in *Harlock* v. *Ashberry* (1882), 19 Ch. D. at p. 548; of Blackburn, J., in *Morgan* v. *Rowlands* (1872), L. R. 7 Q. B. at p. 497; and of Cotton, L. J., in *Green* v. *Humphreys* (1884), 26 Ch. D. at p. 478.

gives an acknowledgment without the consent or knowledge of the others, such acknowledgment only operates to take the case out of the statute against the particular person giving it.[1]

In the case of a simple contract debt the acknowledgment must be made to the creditor or his agent; an acknowledgment to a stranger is not sufficient.[2] In the case of a specialty debt, however, it is sufficient although made to a stranger.[3] And there is another difference between a specialty and a simple contract debt in this connection. If the contract be under seal, any acknowledgment is sufficient, even though no promise to pay can be implied from it; whereas if it be a simple contract debt the acknowledgment must, as we have seen, contain an express promise to pay or be couched in such terms that a promise to pay on request might be reasonably inferred from it.[4]

But a conditional promise to pay will be sufficient if the plaintiff can establish by evidence that the condition has been fulfilled.[5] So a mere admission that there is a debt still remaining unpaid may be a sufficient acknowledgment to bar the statute, if it is not accompanied by words which are inconsistent with an implied promise to pay; but not if the admission be guarded by words which profess inability to pay, or in any other way prevent such an implication from arising.[6] It is not sufficient that the document contains a promise by the defendant to pay when he is able, or by bill, or a mere expectation that he will pay at some future time.[7]

It was at common law a bar to any action if the defendant could show that it was not commenced within the prescribed period of limitation, even though the plaintiff was induced to delay commencing proceedings sooner by the defendant's conduct. In some cases of fraud, however, equity would in former days interfere to prevent the party defrauded from being deprived of his rights by a strict application of the statute.[8] And now in every Division of the High Court, if in

[1] 9 Geo. IV. c. 14, s. 1; 19 & 20 Vict. c. 97, s. 14.
[2] *Stamford Banking Co.* v. *Smith*, [1892] 1 Q. B. 765.
[3] *Moddie* v. *Bannister* (1859), 4 Drewry, 432.
[4] *Tanner* v. *Smart* (1827), 6 B. & C. 603; see also *Quincey* v. *Sharpe* (1876), 1 Ex. D. 72. The question whether a promise to pay can be inferred must depend on the words of each particular acknowledgment: see *Langrish* v. *Watts*, [1903] 1 K. B. 636; *In re Emmett*, [1906] W. N. 201; *Cooper* v. *Kendall*, [1909] 1 K. B. 405.
[5] *Chasemore* v. *Turner* (1875), L. R. 10 Q. B. 500; *Curwen* v. *Milburn* (1889), 42 Ch. D. 424.
[6] See the judgment of Lord Tenterden, C. J., in *Tanner* v. *Smart* (1827), 6 B. & C. at p. 609.
[7] See, for instance, *Spong* v. *Wright* (1842), 9 M. & W. 629.
[8] *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59, overruling *Imperial Gas Light Co.* v. *London Gas Light Co.* (1854), 10 Exch. 39; and see *Lawrance* v. *Lord Norreys* (1890), 15 App. Cas. 210; *Willis* v. *Earl Howe*, [1893] 2 Ch. 545; *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474.

answer to the plea of a statute of limitation the plaintiff can prove that the existence of his cause of action was concealed from him by the fraud of the defendant, and that he could not by reasonable diligence have discovered such fraud, he will not be barred until the statutory period has run from the discovery of such fraud.[1]

It was, before the Judicature Act, the rule "that where the cause of action and the knowledge of the cause of action are contemporaneous, there the statute runs in Courts of Equity as it runs at common law, but that where the existence of the cause of action is concealed from the person who ought to take advantage of it by the fraud of the person who creates it, such person shall not take advantage of the wrong which he himself has done, and that a fresh cause of action accrues from the moment that the fraud is discovered, and that to that fresh cause of action the Statute of Limitations will be applied by the Courts of Equity." [2] And this is now the rule also in actions brought in the King's Bench Division, whether of tort or contract. Thus, where the plaintiff brought an action to recover by way of damages money lost by the fraudulent representations of the defendant which had induced him to purchase shares in a certain company, and the defendant pleaded the Statute of Limitations, the reply of the plaintiff that he did not discover, and had not reasonable means of discovering, the fraud within six years before action, owing to the fact that it had been fraudulently concealed by the defendant, was held good.[3]

Although as a general rule, where the discovery by the plaintiff of his cause of action is prevented by the fraud of the defendant, the statute will begin to run as soon as the plaintiff might, with reasonable diligence, have discovered the fraud, nevertheless there is an exception to this rule in the case of partners. As between partners the statute will not begin to run until the fraud has been actually discovered. The mere fact that the fraud might have been discovered at an earlier date if reasonable diligence had been used will make no difference, for a partner is entitled to rely on the good faith of his co-partners.[4]

### *Parties.*

Next it must be determined what persons shall be made plaintiffs and what persons shall be made defendants on the writ or summons. In the selection of "parties," as they are called, there is a twofold chance of making a mistake; he may omit parties whose presence is essential, or he may add

[1] See note [8] on page 1128.
[2] *Per* Lord Coleridge, C. J., in *Gibbs* v. *Guild* (1882), 9 Q. B. D. at p. 65.
[3] *Gibbs* v. *Guild* (1882), 9 Q. B. D. 59.
[4] *Betjemann* v. *Betjemann*, [1895] 2 Ch. 474.

parties whose presence is improper. A mistake of either kind will certainly hamper him in the subsequent proceedings in the action, and will probably also cause him expense in rectifying the error. He should, therefore, carefully consider whom he must join, and whom he may join or not as he pleases; for some parties may be necessary, others unnecessary, while some he may add or not as he thinks fit. The Rules of the Supreme Court, however, contain provisions which prevent any error as to parties from being necessarily fatal to the ultimate success of the action.

For example, it is expressly provided that no action "shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."[1] And "where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may, if satisfied that it has been so commenced through a *bonâ fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as may be just."[2]

In actions founded on contract, the law relating to parties depends largely on whether the contract sued on be joint, or several, or joint and several.[3] In any action for breach of a contract made with several persons jointly, all of them who are alive and solvent must join as co-plaintiffs. In any action for breach of a contract made by several persons jointly, all of them who are alive and solvent must be joined as co-defendants. "A joint debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors."[4] The personal representatives of a deceased joint creditor should not be joined as plaintiffs, nor should the representatives of a deceased joint debtor be joined as defendants; the right to sue and the liability on the contract vest in the survivors, and therefore only the

[1] Order XVI., r. 11.

[2] *Ib.*, r. 2. This can be done although the original plaintiff has no cause of action: *Hughes* v. *The Pump House Hotel Co., Ltd.* (No. 2), [1902] 2 K. B. 485.

[3] As to this distinction, see *ante*, pp. 659, 660.

[4] *Per* Bowen, L. J., in *In re Hodgson, Beckett* v. *Ramsdale* (1885), 31 Ch. D. at p. 188.

survivors should be made parties. But if all the persons originally entitled to sue on such a joint contract be dead, the personal representatives of the last surviving creditor must sue: if all the persons originally liable on such a contract be dead, the personal representatives of the last surviving debtor must be sued.

If, however, the contract made by two or more persons be several as well as joint, the plaintiff may sue one or more or all of them in the same action. If he joins them all, he can in the same action claim against all of them jointly, and also against each of them severally.[1] If he does not join them all, then he can only rely on the several liability of those whom he has chosen to sue. If the contract be several and not joint, the plaintiff may, at his option, join as parties to the same action all or any of the persons liable thereon; and if any of the persons originally liable on that contract be dead, he may also, if he chooses, add the executors or administrators of such deceased persons.

In an action for a wrong arising out of a contract, the same persons must be joined as parties as are necessary in actions for breach of contract. But in actions of pure tort (*i.e.*, for wrongs independent of any contract) much greater liberty is allowed as to the joinder of both plaintiffs and defendants. As a rule any person injured by a tort may sue alone, though others were injured by the same act. Joint owners or joint occupiers of any land prejudicially affected by any wrongful act, or the joint owners of any chattels which the defendant has taken, destroyed, or injured, whether by negligence or design, should all, as a rule, be joined as co-plaintiffs in the action. But in all cases of actions for the prevention of waste or otherwise for the protection of property, one person may sue on behalf of himself and all persons having the same interest.[2]

If several persons are jointly concerned in the commission of a tort, the plaintiff is not obliged to join them all as

[1] Order XVI., r. 6.
[2] Order XVI., r. 37.

defendants; he may, if he prefers, sue only one or two. The liability of the others will be no defence for those sued, and will not mitigate the damages recoverable; for all persons concerned in a common wrongful act are jointly and severally liable for all damage caused by it. But a judgment against these is a bar to any subsequent action for the same tort against any one else who was jointly liable with them, even though the judgment in the first action has not been satisfied.[1]

Thus a person who has been libelled in a newspaper may join as defendants in the same action the proprietor, the editor, the printer, and the publisher, or any one or more of them, as he thinks fit; for all are jointly and severally liable for the publication and its consequences. If he thinks fit to sue some only of those who are liable to him and obtains judgment against these, the others will escape liability; nor can those against whom he has recovered judgment claim contribution from the rest.[2]

*Joinder of Causes of Action.*

A plaintiff who has more than one cause of action is not always bound to issue a separate writ or summons for each. In some instances he may join two or more causes of action in the same proceeding. There are four distinct cases to be considered:—

1. It may happen that a plaintiff has more than one cause of action against the same defendant or defendants. In such a case he may join them all in the same action.[3] And in most cases he ought to do so; for if he brings two actions unnecessarily where one would have sufficed, he will probably have to pay the costs of one action. Thus a landlord should avail himself of all his causes of action against his tenant in the same action; he should set out every covenant that there is any ground for believing broken, and allege every available breach of such covenant. But if the defendant can convince a Master that the causes of action which the plaintiff has joined cannot be conveniently tried or disposed of together, the Master may order one or more of them to be excluded.

[1] *Brinsmead* v. *Harrison* (1872), L. R. 7 C. P. 547.

[2] See *ante*, p. 617.

[3] To this general rule there are three exceptions or *quasi*-exceptions, which will be found in rr. 2, 3, and 5 of Order XVIII.; and see *post*, pp. 1249, 1386, 1395.

2. But there is not the same liberty when two or more different plaintiffs wish to join on one writ distinct and separate causes of action against the same defendant or defendants. This can only be done in three cases:—

(a) "Claims by plaintiffs jointly may be joined with claims by them, or any of them, separately against the same defendant." [1]

(b) Claims by husband and wife may be joined with claims by either of them separately.[2]

(c) And, generally, unconnected persons who have each a distinct and separate cause of action against the same defendant may join in one writ, whenever their separate causes of action arise out of the same transaction or series of transactions and involve any common question of law or fact, but in no other case.[3]

And even in these three cases, if any defendant can show that the joinder of such causes of action may embarrass or delay the trial of the action, the Master may order separate trials, or make such other order as may be expedient.

Persons who have separate interests in the same premises may join as co-plaintiffs in an action in respect of any injury done to those premises. Thus, the owner and the tenant of a house may sue together for an injunction to restrain a nuisance to that house.[4] Moreover, the owners and tenants of two or more adjoining houses may all join in one action to restrain, or to recover damages for, any nuisance or other injury which affects their respective properties, though to different extents, provided such nuisance or injury is caused by the same acts of the same person.[5]

If a committee or any other defined body of persons be libelled or slandered collectively as a body, they may all join in one action.[6] But if A. defames B. on one occasion, and C. on another, B. and C. cannot join as co-plaintiffs in one action against A., even though the charges be "historically" connected, for each slander is a separate "transaction."[7]

3. Where two or more defendants are jointly liable to the same plaintiff, whether in contract or in tort, he may, as we have seen,[8] join them all in one action. Where, in addition

[1] Order XVIII., r. 6.
[2] *Ib.*, r. 4.
[3] Order XVI., r. 1.
[4] *Viscount Gort and others* v. *Rowney* (1886), 17 Q. B. D. 625.
[5] *House Property Co.* v. *Horse Nail Co.* (1885), 29 Ch. D. 190.
[6] *Booth and others* v. *Briscoe* (1877), 2 Q. B. D. 496.
[7] *Sandes and another* v. *Wildsmith and another*, [1893] 1 Q. B. 771.
[8] *Ante*, pp. 616, 617, 659.

to a claim against two or more defendants jointly, he has also separate claims against one or more of them individually, it is doubtful whether he can join such separate claims with the joint one. The cases on the point are conflicting.[1] But where a plaintiff has no claim against A. and B. jointly, but seeks to recover judgment against A. on one cause of action, and at the same time to recover judgment against B. on a separate and distinct cause of action, he clearly cannot join these two causes of action on one writ.

If, however, a plaintiff has but one cause of action, which entitles him to judgment against either A. or B. but not against both, he may join A. and B. on the same writ as defendants in the alternative, and so determine the question which of them is liable to him.[2] He will then in all probability have to pay the costs of the defendant who is held not liable, though he may in a proper case recover them back again from the defendant who is liable.[3]

Thus, where the plaintiff's shop stood between the parcel office of the Great Western Railway Company and the parcel office of the Midland Railway Company, and the first company obstructed the access to his premises on the north side, the second on the south, and between them seriously injured his business, it was held that these were two separate torts committed by two independent tortfeasors, and gave rise to two distinct causes of action which could not be joined on one writ.[4] But a plaintiff may join in one action a claim against a principal on a contract made by his alleged agent, and an alternative claim against the alleged agent for contracting without authority; for in neither event could he recover against them both.[5]

4. Separate causes of action with different plaintiffs and also different defendants can never be joined on the same writ. If A. has a cause of action against X., and B. has a wholly distinct and independent cause of action against Y.,

[1] *Dessilla* v. *Schunck & Co. and Fels & Co.*, [1880] W. N. 96; *Pope* v. *Hawtrey and another* (1901), 85 L. T. 263; *Bullock* v. *L. G. O. Co.*, [1907] 1 K. B. 264, followed in *Compania Sansinena* v. *Houlder Bros.*, [1910] 2 K. B. 354. But claims against husband and wife may be joined with claims against either of them separately (Order XVIII., r. 4).

[2] Order XVI., r. 7.

[3] *Sanderson* v. *Blyth Theatre Co.*, [1903] 2 K. B. 533; *Bullock* v. *L. G. O. Co. and others*, *suprà*.

[4] *Sadler* v. *G. W. Ry. Co.*, [1896] A. C. 450; and see *Gower* v. *Couldridge and others*, [1898] 1 Q. B. 348.

[5] *Honduras Ry. Co.* v. *Lefevre and Tucker* (1877), 2 Ex. D. 301

A. and B. cannot issue one writ against X. and Y., even though their separate actions arise out of the same transaction and involve similar questions of law or fact. But if there be many such actions a Master will sometimes make an order that one be taken as "a test action," and that the others be stayed till that one is tried, and then follow its event.

## Chapter XII.

### ORDINARY REMEDIES.

Let us assume that the intending plaintiff has now satisfied himself that he has a good cause of action which is not barred by any Statute of Limitation, and that he has decided whom he will make parties, and what causes of action he will join on his writ or summons. He must next proceed to select the Court in which he will sue and to determine what relief he will ask that Court to afford him.

### *Choice of Court.*

We have already dealt with the jurisdiction of our different civil Courts. In many cases the action might be brought in more than one Court; and in such cases the plaintiff should sue in an inferior Court rather than in a superior Court, unless there is some good reason for his preferring the latter. Various Acts of Parliament contain provisions which mulct in costs a plaintiff who sues in the superior Court when he might with more propriety have brought his action in an inferior Court.

For example, by section 116 of the County Courts Act, 1888,[1] as amended by section 3 of the County Courts Act, 1903,[2] if an action, founded on contract, be brought in the High Court of Justice and the plaintiff recovers less than £20, he will be entitled to no costs whatever; if he recovers £20 or more, but less than £100, he will be entitled to county court costs only; if he recovers exactly £100, he will be entitled to county court costs only[3]—

(i.) unless a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or makes a special order as to costs;[4]

[1] 51 & 52 Vict. c. 43.
[2] 3 Edw. VII. c. 42.
[3] *Millington* v. *Harwood*, [1892] 2 Q. B. 166.
[4] *Neaves* v. *Spooner* (1887), 58 L. T. 164.

(ii.) unless within twenty-one days after service of the writ, or such further time as may be allowed, the plaintiff obtains an order, under Order XIV., empowering him to enter judgment for £20 or more. A judge of the High Court has power to extend the time.[1]

If the action was founded on tort, and the plaintiff recovers less than £10, he will be entitled to no costs whatever; if he recovers £10 or more, but less than £20, he will be entitled to county court costs only; unless a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or makes a special order as to costs.

There are similar provisions with reference to other inferior civil courts, such as the Mayor's Court, London, the Liverpool Court of Passage, etc.

In former days the choice of a Court depended largely upon the relief which the plaintiff desired to obtain by his action. Many remedies were peculiar to certain Courts and could not be obtained in others. The Courts of common law, as a rule, could only compensate an injured plaintiff by awarding him damages, or ordering his goods or land to be restored to him. Courts of equity, on the other hand, even where recognising and enforcing exactly the same primary rights and liabilities as the common law Courts, applied different remedies to protect and enforce them; and much of the value of the Chancery system depended upon the efficiency of these remedies. Where the common law could only award damages for a wrong when committed, equity could prevent its commission by injunction. Where law could only give damages for a breach of contract, equity could enforce its specific performance. Where law could give damages for fraud or breach of faith, equity could insist upon the defendant delivering an account of all moneys which he had thus wrongfully acquired, or declare him to be trustee for the injured party of all the property affected by such fraud or breach of trust. But now in most, if not all, of our civil Courts, Superior or Inferior, every kind of relief, legal or equitable, can be claimed and given; and even where it is not claimed, yet if the right to it appear incidentally in the course of the proceedings, the appropriate relief will be granted.[2]

[1] *Haycocks* v. *Mulholland*, [1904] 1 K. B. 145.

[2] See, for instance, ss. 24, 89 of the Judicature Act, 1873 (36 & 37 Vict. c. 66).

Henceforward in this Chapter, and indeed throughout the next ten Chapters, we will assume that the plaintiff has commenced his action in some Division of the High Court of Justice. The procedure in the county court is dealt with in the last Chapter of this Book.[1]

### *Relief.*

The same cause of action may entitle a plaintiff to relief of different kinds. He should therefore state, both on his writ and in his statement of claim,[2] the precise relief which he desires to obtain in the action. He may ask for any of the following kinds of relief or for two or more of them, either together or in the alternative:—

(i.) Payment of a debt with or without interest.
(ii.) Damages.
(iii.) Possession of land.
(iv.) Recovery of a chattel.
(v.) A *mandamus*.
(vi.) An injunction.
(vii.) A declaration of right or title.
(viii.) The appointment of a receiver.
(ix.) An account.
(x.) Specific performance of a contract.

The first five of the above kinds of relief are legal remedies; the rest are in their origin equitable.

### I.—Legal Remedies.

The Superior Courts of common law, as we have seen, were formerly much restricted as to the nature of the relief which they could afford to a litigant. They could enable him to recover a debt, in some cases with interest; they could award him damages for any tort or breach of contract; they could restore to him possession of any land or chattel

[1] *Post*, pp. 1329—1342.

[2] A statement of claim supersedes the writ; hence if some special form of relief be claimed on the writ and not in the statement of claim, it will be deemed to have been abandoned: *Cargill* v. *Bower* (1878), 10 Ch. D. at p. 508.

of which the defendant had deprived him; and in a few cases they could order a peremptory writ of *mandamus* to issue.[1] All these remedies are now possessed by every Court in every Division of the High Court of Justice.

1. *Payment of a Debt with or without Interest.*

More than half of the actions commenced in our Courts are brought to recover debts, and most of these actions are undefended. In many of them the plaintiff claims interest, but to this he often is not entitled. Of course, if at the time when a loan is effected or other debt incurred it is expressly agreed that interest at a certain rate shall be paid from a date named, then interest at that rate can be recovered for the agreed period. So, if the course of dealing between the parties be such that it may be reasonably inferred that the debtor at the date of the contract intended and agreed to pay interest.[2]

An agreement to pay interest can be implied from the personal acts of the debtor; as where a tradesman has sent in bills from time to time in which interest is charged, and the debtor has paid such bills in full without objection.[3] But where goods are sold and delivered, and no mention of interest is made at time of contract, the vendor cannot entitle himself to interest merely by subsequently giving the purchaser notice that, if he does not pay within a specified time, interest will be charged, though such a notice may be useful as a demand in writing under section 28 of the statute 3 & 4 Will. IV. c. 42.

If a surety be compelled to pay a debt which he has guaranteed, he can recover the amount paid from the principal debtor with interest thereon at a reasonable rate.[4] So in an action for money had and received to the use of the plaintiff, there is some ground for holding that interest can be recovered if it can be shown that the defendant has made interest on the money.[5]

As a rule, however, where the contract has been reduced into writing, and it is silent as to interest, no interest can be recovered.[6] But to this rule there are exceptions. On any

[1] This writ will be found discussed under the head of Extraordinary Remedies, *post*, pp. 1163—1166.

[2] *De Havilland* v. *Bowerbank* (1807), 1 Camp. 50; *L. C. & D. Ry. Co.* v. *S. E. Ry. Co.*, [1893] A. C. 429.

[3] *In re Marquis of Anglesey*, [1901] 2 Ch. 548.

[4] *Petre* v. *Duncombe* (1851), 20 L. J. Q. B. 242.

[5] *Walker* v. *Constable* (1798), 1 Bos. & Pul. 306; *De Havilland* v. *Bowerbank*, *supra*; *Fruhling* v. *Schroeder* (1835), 2 Bing. N. C. 77.

[6] *Page* v. *Newman* (1829), 9 B. & C. 378, followed in *L. C. & D. Ry.* v. *S. E. Ry.*, *supra*.

bill of exchange, promissory note, cheque or any negotiable instrument to which the Bills of Exchange Act, 1882, applies, interest is payable till payment or judgment at the rate of 5 per cent. if no other rate be stated. Interest at a fair percentage will also be allowed on a money bond.[1] A judgment carries interest at 4 per cent. both on debt and costs.[2] Claims for money lent with interest at an unusual or exorbitant rate are, of course, within the Money-lenders Act, 1900.[3]

In no other circumstances can interest be recovered unless the case falls under the statute 3 & 4 Will. IV. c. 42, which enables a jury, "if they shall think fit," to award interest as damages "upon all debts or sums certain payable at a certain time or otherwise . . . if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment;" and also on the money recoverable under any policy of assurance made after the passing of the Act.[4] A judge who is trying a case without a jury has the same power.[5] Again, if any money has been obtained from the plaintiff by fraud or force, the jury, in assessing the unliquidated damages which the defendant must pay, may allow the plaintiff such amount as they think fit as damages for being deprived of such money; but not where such money has been received by him through an innocent mistake.[6] Strictly speaking, however, such damages are not interest at all.

### 2. *Damages.*

This form of relief is the commonest. It is almost invariably asked for in the King's Bench Division, and

[1] *In re Dixon*, [1900] 2 Ch. 561.
[2] 1 & 2 Vict. c. 110, s. 17; *Ashworth* v. *English Card Clothing Co.* (No. 2), [1904] 1 Ch. 704.
[3] 63 & 64 Vict. c. 51; see *ante*, pp. 711, 723.
[4] Ss. 28, 29.
[5] See *L. C. & D. Ry. Co.* v. *S. E. Ry. Co.*, [1892] 1 Ch. at p. 146; *Macbeth* v. *Maritime Insurance Co.* (1908), 24 Times L. R. 559.
[6] *Johnson* v. *R.*, [1904] A. C. 817.

frequently also in the Chancery and Admiralty Divisions. Every breach of contract, every violation of a right of the plaintiff, every injury done to the plaintiff through the defendant's negligence or fraud, entitles the plaintiff at all events to some damages. The rules which govern the assessment of damages and determine the "measure of damages," as it is called, are discussed in a later Chapter;[1] the reader will find there some account of the different kinds of damages recoverable and the rules relating to "remoteness of damage."

In an action for unliquidated damages, it is not necessary to insert any specific figure as the precise amount of damages claimed. But where the plaintiff's claim is liquidated and can be ascertained exactly, the pleader should claim only the precise amount to which his client is entitled. Where he cannot be exact, it is wiser to claim too much rather than too little; for if the jury find a verdict for a larger amount than the plaintiff claimed, that amount cannot be recovered without amending the record. The judge, however, has power to make such an amendment, if he thinks fit.[2]

An inquiry as to damages is often directed by the Chancery Division where there is no jury; it is taken by a Master.[3]

### 3. *Possession of Land.*

A plaintiff may also claim possession of land to which he is entitled and of which the defendant is wrongfully in possession. He must state on his writ or summons details sufficient to clearly identify the land in question. If he succeeds in the action, the judgment will be "that the plaintiff do recover possession of the land" so described; and the plaintiff will be entitled at once to a writ of possession, bidding the sheriff to enter thereon and without delay to "cause the plaintiff to have possession of the said land and premises with the appurtenances."

### 4. *Recovery of a Chattel.*

Before the Judicature Act, 1873, when a person brought an action for the return of any chattel which had been

[1] See *post*, Chap. XXI.
[2] Order XXVIII., r. 1.
[3] See, for instance, *Maxim Nordenfelt Co.* v. *Nordenfelt*, [1893] 1 Ch. 630.

wrongfully taken out of his possession, the relief for which he asked and the judgment which he obtained were always in the alternative . . . "for the recovery of the thing, or £——, its value, and for damages for its detention." The defendant was thus permitted to retain the thing if he paid the amount at which its value was assessed by the jury. This was a hardship on a plaintiff who attached a special value to the chattel wrongfully removed and who deemed damages an inadequate compensation for its loss. But now the option has been taken from the defendant and given to the plaintiff. "Where it is sought to enforce a judgment or order for the recovery of any property other than land or money by writ of delivery, the Court or a judge may, upon the application of the plaintiff, order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property upon paying the value assessed, if any, and that if the property cannot be found, and unless the Court or a judge shall otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the sheriff's bailiwick, till the defendant deliver the property; or at the option of the plaintiff, that the sheriff cause to be made of the defendant's goods the assessed value, if any, of the property."[1] If the defendant disobeys an order made in this form and still refuses to return the chattel, he may be attached and sent to prison.[2]

Again, in an action for breach of a contract to deliver specific goods, the Court may on the application of the plaintiff direct that the contract be performed specifically without giving the defendant the option of retaining the goods on payment of damages.[3]

### 5. *A Mandamus.*

A *mandamus* is a peremptory order by the Court bidding the defendant to do that which it is clearly his duty to do.

[1] Order XLVIII., r. 1, following s. 78 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). A bailiwick is the county or other area over which a sheriff exercises jurisdiction.

[2] *Hymas* v. *Ogden*, [1905] 1 K. B. 246.

[3] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 52, *ante*, p. 801. This section re-enacts section 2 of the Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97).

The plaintiff must be personally interested in the fulfilment of such duty.[1] He must indorse his writ with a claim in the following form:—"The plaintiff's claim is for a *mandamus* commanding the defendant to do (*here specify the duty which the plaintiff desires to have performed*)."[2] Other relief, such as damages or an injunction, may be claimed on the same writ.[3] The action proceeds in the same way as an ordinary action for tort; and either by interlocutory order, or in the final judgment in the action, the judge may command the defendant, either forthwith or on the expiration of such time and upon such terms as may appear to him to be just, to perform the duty in question. Such order will have the same effect as a writ of *mandamus* formerly had.[4] The judge may subsequently extend the time for the performance of the duty.[5]

The writ of *mandamus* to which reference has just been made is one of the "extraordinary remedies" with which we shall deal in the next chapter. It differs from the claim for a *mandamus* indorsed on a writ in two important particulars:—

(i.) No writ of *mandamus* can now be issued in an action.[4]

(ii.) An action for *mandamus* may sometimes lie when the old writ of *mandamus* would not have issued.[6] "A *mandamus* may be granted in all cases in which it shall appear to the Court to be just or convenient that such order should be made."[7] The duty sought to be thus enforced need not therefore be of a strictly legal nature,[8] as is still required in the case of the writ of *mandamus*.

An action for a *mandamus* may lie where no actual damage has been sustained. It is enough if the plaintiff either has been or may be damaged by the defendant's neglect of his duty.[9] But even in an action a *mandamus* will not be granted to compel the specific performance of a private or personal contract—for instance, a *mandamus* cannot be issued to enforce a promise to marry.[10]

[1] Order LIII., r. 1.
[2] R. S. C., Appendix A., Part III., s. IV.
[3] See *Fotherby* v. *Metropolitan Ry. Co.* (1866), L. R. 2 C. P. at p. 195; *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 708.
[4] Order LIII., r. 4. See *post*, p. 1163.
[5] Order LIII., r. 3.
[6] See the judgment of Lord Campbell, C. J., in *Norris* v. *Irish Land Co.* (1857), 8 E. & B. at p. 525.
[7] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8).
[8] *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 248, 703.
[9] See *Fotherby* v. *Metropolitan Ry. Co.* (1866), L. R. 2 C. P. at p. 198.
[10] *Benson* v. *Paull* (1856), 6 E. & B. 273; approved in *Norris* v. *Irish Land Co.*, *supra*.

## II.—Equitable Remedies.

There are many different kinds of equitable relief. Some are appropriate only to a special class of persons or actions. Thus a mortgagee can bring an action to foreclose a mortgage, a mortgagor to redeem it; the creditor of a company can present a petition to wind it up compulsorily. The reader will find such special proceedings described in other books; it is only possible to deal here very briefly with those kinds of equitable relief which are general in their application and which therefore frequently occur. Such are:—

6. An Injunction.
7. A Declaration.
8. The Appointment of a Receiver.
9. An Account.
10. Specific Performance of a Contract.

### 6. *An Injunction.*

An injunction is a peremptory order of the Court or a judge forbidding the committal, continuance, or repetition of any tort or breach of contract. There are many cases in which damages do not afford the party injured sufficient compensation;[1] he therefore applies to the Court to prevent the threatened damage, or, if any damage has already occurred, to prevent any further damage being done. In many cases a plaintiff is entitled to both damages and an injunction—to damages, that is, for the loss or injury already sustained, and to an injunction to prevent any further loss or damage. But an injunction will not be granted unless there is good reason to apprehend that the defendant is about to commit an unlawful act. If he has already committed one, it must be alleged and proved that he threatens and intends to repeat or continue it, unless such an intention is already apparent from the nature of the case or from other facts proved or admitted.[2]

Injunctions are either interlocutory or perpetual; they may

[1] See the learned judgment of Lord Cairns, L. C., in *Doherty* v. *Allman* (1878), 3 App. Cas. at pp. 716—723; followed in *McEacharn* v. *Colton and others*, [1902] A. C. 104.

[2] See *Stannard* v. *Vestry of St. Giles, Camberwell* (1882), 20 Ch. D. at p. 195.

also be divided into restrictive and mandatory. Where the rights of the parties are still undecided, an injunction is frequently issued to protect the property and interests of the parties pending litigation. This is called an interim or interlocutory injunction, and it remains in force only till the trial of the action. A perpetual injunction is granted at the trial as a part of the judgment of the Court, and remains in force until it is dissolved by the order of the same or of some higher Court. A restrictive injunction commands the defendant not to do something; a mandatory injunction, which is much rarer, commands him to do something, *e.g.*, to pull down a wall which he has built so as to obstruct ancient lights and be a nuisance to the plaintiff's premises.[1] A mandatory injunction may either be interlocutory or perpetual; but it is very seldom granted on an interlocutory application. Such an order will only be made where there has been a breach of faith, contempt of Court, or some other misconduct on the part of the defendant: "if, for instance, the injury cannot fairly be compensated by money; if the defendant has acted in a high-handed manner; if he has endeavoured to steal a march upon the plaintiff, or to evade the jurisdiction of the Court."[2] And even at the trial a mandatory injunction will only be granted when the payment of damages would be clearly inadequate to compensate the plaintiff for the injury which will be done him if the state of things wrongfully created by the defendant be allowed to continue. In some cases, however, the Court prefers to make what is really a mandatory order in the guise of a restrictive injunction.[3] Thus in *Strelley* v. *Pearson*,[4] the Court, instead of ordering the defendant to continue pumping, granted an injunction restraining him "from ceasing to pump" water out of the plaintiff's mine.

The Court has power to grant an injunction wherever it appears "just or convenient that such an order should be

[1] *Colls* v. *The Home and Colonial Stores*, [1904] A. C. 179.
[2] *Per* Lord Macnaghten, *ib.*, at p. 193.
[3] See the judgment of Cozens-Hardy, M. R., in *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. at p. 711.
[4] (1880), 15 Ch. D. 113.

made."[1] But the words "just and convenient did not mean that the Court was to grant an injunction simply because the Court thought it convenient: it meant that the Court should grant an injunction for the protection of rights or for the prevention of injury according to legal principles; but the moment you find that there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretence for inflicting that injury upon him, it appears to me that the Court ought to interfere."[2]

On proof of these facts the plaintiff will generally be entitled both to recover damages for the injury already sustained and to obtain an injunction to restrain the continuance or repetition of the injury in the future. But an injunction will not, as a rule, be granted, where the injury to the plaintiff's right is trifling, where the payment of damages is an adequate compensation, or where, in the special circumstances, it would be oppressive to the defendant to grant an injunction.[3] Nevertheless, where there is a legal right to an injunction, the fact that, if granted, it will cause great inconvenience or distress is no legal ground for not granting it—not even if obedience to the order of the Court will involve "stopping the defendant's works and throwing out of employment a large number of workmen."[4] That the defendant was actuated by a good motive in doing that which it is now sought to restrain him from doing is no answer to the application.[5]

As a rule, the person who applies for an injunction need not show that he has already sustained any damage; for the object of an injunction is to anticipate and prevent damage being sustained. Thus the purchaser of a plot of land can obtain an injunction to restrain his vendor from doing anything on an adjoining plot of land still owned by

[1] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8).
[2] *Per* Jessel, M. R., in *Aslatt* v. *Corporation of Southampton* (1880), 16 Ch. D. at p. 148.
[3] See the judgment of Smith, L. J., in *Shelfer* v. *City of London Electric Light Co.*, [1895] 1 Ch. at pp. 319 *et seq.*
[4] *Wilts and Berks Canal Navigation Co.* v. *Swindon Waterworks Co.* (1874), L. R. 9 Ch. 451; (1875), L. R. 7 H. L. 697.
[5] *Att.-Gen.* v. *Birmingham Corporation* (1858), 4 Kay & J. 528.

the vendor, which would be a breach of his implied covenant not to derogate from his own grant, although the purchaser has not yet suffered any actual damage.[1] But where special damage is an essential part of the cause of action, an injunction will not, it seems, be granted until some special damage, however small, has been sustained; for without such special damage there is no ground of action. "Damages and injunction are merely two different forms of remedy against the same wrong, and the facts which must be proved in order to entitle a plaintiff to the first of these remedies are equally necessary in the case of the second." [2]

An order for an injunction "may be made either unconditionally or upon such terms and conditions as the Court may think just." [3] Such terms will be imposed whenever it is sought to restrain the defendant from doing that which he *primâ facie* has a legal right to do. Thus, where there was a dispute as to the construction of a lease, the Court refused to restrain a landlord from distraining unless the tenant paid all the rent in arrear into Court within a fortnight.[4]

An injunction is often granted to prevent any threatened waste, or trespass to land. This can be done whether the person against whom such injunction is sought is or is not in possession under any claim or title, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title: and whether the estates claimed by both or by either of the parties are legal or equitable.[3] Again, a mortgagor who is in receipt of the rents and profits of the mortgaged premises has a sufficient interest to enable him to maintain an action for an injunction to restrain any injury being done to the mortgaged property, without joining the mortgagee as a co-plaintiff.[5] And an injunction may be granted to restrain a defendant from publishing of the plaintiff to the injury of his trade matter which a jury has found to be libellous.[6] But an interim injunction is now very seldom granted in an action either of libel or slander.[7]

[1] *Siddons* v. *Short* (1877), 2 C. P. D. 572; but the Court will refuse to grant an injunction to restrain what is known as "ameliorating waste": *Doherty* v. *Allman* (1878), 3 App. Cas. 709, followed in *McEacharn* v. *Colton*, [1902] A. C. 104.

[2] *Per* Lord Watson in *White* v. *Mellin*, [1895] A. C. at p. 167.

[3] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25 (8).

[4] *Shaw and others* v. *The Earl of Jersey* (1879), 4 C. P. D. 120.

[5] 36 & 37 Vict. c. 66, s. 25 (5); *Fairclough* v. *Marshall* (1878), 4 Ex. D. 37.

[6] *Saxby* v. *Easterbrook* (1878), 3 C. P. D. 339; *Hill* v. *Hart Davies* (1882), 21 Ch. D. 798; *Quartz Hill, &c., Co.* v. *Beall* (1882), 20 Ch. D. 501; see also *Liverpool Household Stores Association* v. *Smith* (1887), 37 Ch. D. 170.

[7] *Bonnard* v. *Perryman*, [1891] 2 Ch. 169.

A few specimens of a claim for an injunction are subjoined :—

*Infringement of a Patent.*

The plaintiff claims an injunction restraining the defendants, their servants and agents, from manufacturing, selling, offering for sale or in any manner dealing with, any articles constructed in infringement of the said letters patent.

*Libel.*

And the plaintiff claims :—

1. Damages.

2. An injunction to restrain the defendant and his agents from further circulating, distributing or otherwise publishing the said leaflet, or any other reprint of the said speech, or any similar libels affecting the plaintiff in his said profession and office.

*Trespass to Land.*

The plaintiff's claim is for £—— damages for the defendants' wrongfully entering the plaintiff's meadow, known as The Long Close, in the parish of Ashill in the county of Somerset ; and for an injunction restraining the defendants, their servants, workmen and agents, from entering on the plaintiff's said meadow, or from destroying or otherwise injuring the hedge or fence now on the east side thereof, or from erecting or causing to be erected a wooden or other fence on the said east side thereof, or from in any way interfering with the plaintiff's use and enjoyment of the said meadow.

*Ancient Lights.*

(*Mandatory Injunction.*)

The plaintiff claims :—

1. An order that the defendant forthwith pull down and remove all buildings raised by him above the level of the old houses formerly on the site thereof, and all buildings on the site of the said former houses erected in such manner as to darken or obstruct any of the ancient lights and windows of, and be a nuisance to, the house and premises now in the occupation of the plaintiff.

2. That the defendant be perpetually restrained from erecting any buildings on the site of the said former houses, in such manner as to darken or obstruct any of the plaintiff's said ancient lights and windows, or to be a nuisance to the plaintiff's said house and premises.

It may be well to add a few words as to the procedure by which an interlocutory injunction is obtained. The application in the King's Bench Division is made to a judge at chambers,[1] in the Chancery Division by a motion before a judge in court. It must be supported by an affidavit as to the facts. It can be made at any stage of the action. In urgent cases leave will be given to serve with the writ a summons or a notice of motion for an interim injunction. In very urgent cases if strong grounds be shown the judge will sometimes grant an interim injunction *ex parte* (*i.e.*, in the absence of the other side) in the first instance ; but such an injunction only remains in force till the persons affected by it can be heard.

On an application for an interim injunction the Court must be satisfied that there is a serious question to be tried at the hearing, and that on the facts there is a probability that the plaintiff is entitled to relief. The matter must be urgent ; there must be immediate and pressing injury threatened by the defendant's proceedings. All the facts must be laid

[1] Order LIV., r. 12 (*e*) ; *ante*, p. 997.

before the Court, and the plaintiff must undertake to pay, in the event of the interim injunction not being made perpetual, any damages which the defendant can prove that he has suffered in consequence of its having been granted. The order for injunction recites such undertaking.

Where an injunction requires the defendant to do some act within a limited time from its service upon him, it must be served on him personally, and further for the purpose of proceeding by process for contempt, or sequestration, it must be indorsed with the words :—

"If you, the within-named A. B., neglect to obey this judgment [*or* order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or* order]." [1]

The affidavit of service must state that the copy served was so indorsed. This indorsement is not necessary on mere prohibitive orders.

A defendant also can in a proper case obtain an interlocutory injunction. He may, even before delivering a counterclaim, apply by motion for an injunction against the plaintiff, if his counterclaim is founded upon the same contract as that on which the plaintiff is suing. Thus in *Collison* v. *Warren*,[2] the defendant gave notice of motion for an injunction seven days after the writ was issued, and on that motion obtained an order restraining the plaintiff from interfering with or disturbing the defendant in his possession and occupation of a house.

If either party disobeys an injunction, whether interim, perpetual, or mandatory, while it is still in force, he is liable to be attached and sent to prison.[3]

### 7. *Declaration of Right or Title.*

The Court may now in any action make a declaration as to the rights or title of the parties before it, which will bind those parties and all deriving title under them. The declaration sought for must be claimed on the writ or in the pleadings —strictly on both. A claim for such a declaration is generally supplemental to some other claim, such as one for damages or an injunction;[4] but the Court may make the declaration asked for even where it refuses to grant an injunction or to give any other relief.[5]

Moreover, a declaration of right or title may be claimed in an action brought simply and solely to obtain that declaration, and for this there is good reason. It often happens that a

[1] Order XLI., r. 5.
[2] [1901] 1 Ch. 812.
[3] Injunctions are enforced against a corporation by sequestration : see *post*, p. 1322, and Order XLII., r. 7.
[4] Such a claim is frequently made in actions for the recovery of land ; see *post*, p. 1250.
[5] *Llandudno Urban District Council* v. *Woods*, [1899] 2 Ch. 705.

man wishes to ascertain his exact rights before they have been infringed. The mere fact that his supposed rights have been seriously called in question was formerly not enough to give him any right of action. But now the Court will make binding declarations as to the right or title of any party to an action, although nothing has been done to entitle him either to damages or to an injunction. Thus, where a conveyance or other deed has been drawn up and executed, and a controversy has arisen as to the rights of one of the parties under it, he need not wait until a formal breach of his right is committed by the other party, nor is he bound to continue to act in uncertainty as to the true construction of the instrument. He can apply for a declaration, and thus obtain a decision of the Court as to its construction, and act in the light of that decision. Again, it may be that the plaintiff does not wish to obtain possession of land or any other immediate relief. He merely wishes to have his rights defined and declared. Suppose, for instance, that a freeholder granted a lease of a farm for a term of years, and died before that term had expired. If a dispute subsequently arises between his heir and his devisee as to the ownership of the farm, neither of them can eject the tenant, for both are bound by the lease. They can only ask the Court to declare which of them is entitled to receive the rent.

The Court of Chancery, however, would not before the passing of the Judicature Act make a binding declaration of title unless a right to "some consequential relief" was shown; they declined to make declarations "in the air;"[1] and this practice was followed—with some hesitation—in the High Court from 1875 to 1883.[2] But in October, 1883, it was clearly provided[3] that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not."[4] And now "actions can be brought merely to declare rights; and this is an innovation of a very important kind."[5]

[1] *Rooke* v. *Lord Kensington* (1856), 2 Kay & J. 753.
[2] *Cox* v. *Barker* (1876), 3 Ch. D. 370—372.
[3] Order XXV., r. 5.
[4] See *Honour* v. *Equitable Life Society*, [1900] 1 Ch. 852; *Société Maritime* v *Venus Steam Shipping Co.* (1904), 9 Com. Cas. 289.
[5] *Per* Lindley, L. J., in *Ellis* v. *Duke of Bedford*, [1899] 1 Ch. at p. 515.

Hence the Court can now declare what the rights of the parties are or will be, although no ancillary relief is claimed, and even where no substantive relief can at present be given.[1] Such declaration may be made on an interlocutory application whether by petition or summons.[2] But the jurisdiction under this rule will be exercised with great caution.[3] The Court can in its discretion make a declaration as to a future right, but it will not do so if such a declaration would be "embarrassing or useless for any good purpose."[4]

The following are examples of declarations which have been recently made under this rule :—

That the defendant, a clergyman, was not entitled to hold services and deliver addresses on the seashore at Llandudno without the consent of the Urban District Council.[5]

That the defendants were not entitled to send sewage from their district into the plaintiffs' sewer without the consent of the plaintiffs.[6]

That the defendants were not entitled to make an unreasonable demand for payment as a condition for giving their consent to an assignment by the plaintiff of his lease, and that the plaintiff was entitled to assign his lease without any further consent of the defendants.[7]

That the defendant, who was the owner of the dominant tenement, was not entitled to any light claimed by him in respect of such tenement, he having lost such right by alterations in the said tenement.[8]

That upon the true construction of a lease made between the parties, and in the events which had happened, the plaintiff was entitled to assign the residue of the term to his wife without the consent of the lessors, and free from conditions.[9]

That a by-law made by an urban council forbidding the erection on its foreshore of certain booths, tents, swings, &c., except as therein provided, was valid.[10]

But a general declaration as to title ought rarely to be made on a vendor and purchaser summons, that procedure being only intended for the decision of isolated points arising out of or connected with the contract.[11]

[1] *Evans* v. *Manchester, &c., Ry. Co.* (1887), 36 Ch. D. at p. 640 ; *London Association of Shipowners* v. *London and India Docks Joint Committee*, [1892] 3 Ch. 242.
[2] *In re St. Nazaire Co.* (1879), 12 Ch. D. at p. 94.
[3] *Faber* v. *Gosworth U. D. C.* (1903), 88 L. T. 549.
[4] *Per* Jelf, J., in *Att.-Gen.* v. *Scott* (1904), 20 Times L. R. at p. 633.
[5] *Llandudno U. D. C.* v. *Woods*, [1899] 2 Ch. 705.
[6] *Islington Vestry* v. *Hornsey U. D. C.*, [1900] 1 Ch. 695.
[7] *Young* v. *Ashley Gardens Properties, Ltd.*, [1903] 2 Ch. 112.
[8] *Ankerson* v. *Conelly*, [1906] 2 Ch. 544 ; [1907] 1 Ch. 678.
[9] *Evans* v. *Levy*, [1910] 1 Ch. 452.
[10] *Williams* v. *Weston-super-Mare U. D. C.* (1910), 26 Times L. R. 506.
[11] *In re Wallis and Barnard's Contract*, [1899] 2 Ch. 515.

### 8. *The Appointment of a Receiver.*

A receiver is an officer of the Court, appointed in the interests of all parties to an action for the purpose of protecting and preserving the subject-matter of the litigation till judgment be given. If the property in dispute be land or buildings, it will be his duty to collect the rents, to receive any other profits, to expend a certain portion of the money which thus comes into his hands in repairing the premises, and then to hold the balance to abide the order of the Court. Or he may be appointed to collect the debts due to a company or to a firm, to receive the share of any joint owner in a partition action, or to manage a business pending litigation.[1]

The Judicature Act conferred upon all Divisions of the High Court the very wide power of appointing a receiver "in all cases in which it shall appear to the Court to be just or convenient that such order should be made;"[1] but the exercise of this power is restricted by many considerations which are justified by practical experience. Thus a receiver will not, as a rule, be appointed if either party is competent to do the work and can be trusted to do it properly. But where it is just or convenient, such an order will be made, although the dispute is as to the legal title of the parties and the defendant is in possession;[2] and the Court will give the receiver possession of the property in so far as is necessary for the preservation of the plaintiff's rights.[3] Where the property is let to impecunious weekly tenants, it is clearly convenient in the interests of all parties that a receiver should be appointed, lest the tenants, learning that there is a dispute as to who is really their landlord, should cease to pay rent altogether.[4] Again, a *cestui que trust* may apply for a receiver if his trustee carelessly omits to call in hazardous loans or to sell wasting securities. So a secured creditor may fairly claim this relief if his debtor is dissipating the property which

[1] 36 & 37 Vict. c. 66, s. 25 (8).
[2] *Forwell* v. *Van Grutten*, [1897] 1 Ch. 64; *John* v. *John*, [1898] 2 Ch. 573; *Cummins* v. *Perkins*, [1899] 1 Ch. 16.
[3] *Charrington & Co., Ltd.* v. *Camp*, [1902] 1 Ch. 386.
[4] *Gwatkin* v. *Bird* (1882), 52 L. J. Q. B. 263.

is the security for the loan, *e.g.*, if a tradesman is neglecting his business and not calling in the debts due to him from customers, if a company in difficulties is squandering its assets, if a mortgagor leaves buildings out of repair and land uncultivated, so as to seriously reduce their value. When the debenture-holders of a company proceed to enforce their security by the appointment of a receiver, their floating charge is said to "crystallise"—that is, it becomes a definite and specific charge on the assets of the company.[1]

If a plaintiff desires the appointment of a receiver, he should claim it on his writ. Nevertheless the Court has power to appoint a receiver at any stage of the proceedings—even on appeal—although the plaintiff has not asked for it on his writ.[2] The plaintiff may apply for a receiver either *ex parte* or on notice; but a receiver will only be granted on an *ex parte* application in cases of extreme urgency.[3] Any other party, after appearance, on notice to the plaintiff may apply for one. In the Chancery Division the application if opposed is made by motion in Court; if unopposed, by summons at chambers. In the King's Bench Division it is always made by summons before a judge at chambers.[4]

The person to be appointed must first give security to the satisfaction of a Master "to duly account for what he shall receive as such receiver, and pay the same as the Court shall direct." He will, unless otherwise ordered, be allowed a proper salary or commission on the amount of his receipts.[5] He will be entitled to further payment in respect of any extraordinary trouble or expenditure incurred in discharge of his duties,[6] but not, as a rule, when he is himself a party to the action. He will be paid his costs and expenses in priority to the costs of other parties, and next after the costs of the realisation.[7]

His first duty is to take possession of the property committed to his charge; his next duty is to manage it, remembering always that he is appointed on behalf of all parties to the action, and not of one party only. He has full authority to let lands and houses, to receive rents, and to do everything else in his power to make the property as productive as possible for the benefit of the party who may ultimately be declared to be its owner. With the sanction of the Court where necessary, he can in fact do everything that the owner could do were he in possession. In so managing the property under his care he may perhaps incur liabilities to

[1] As to the appointment of a receiver by way of equitable execution, see *post*, p. 1319.

[2] *Hyde* v. *Warden* (1876), 1 Ex. D. 309; *Anglo-Italian Bank* v. *Davies* (1878), 9 Ch. D. 287; *Salt* v. *Cooper* (1880), 16 Ch. D. 554.

*In re Potts, Ex parte Taylor*, [1893] 1 Q. B. 648.

[4] Order LIV., r. 12 (c); *ante*, p. 997.

[5] Order L., r. 16.

[6] *Harris* v. *Sleep*, [1897] 2 Ch. 80.

[7] *Batten* v. *Wedgwood Coal and Iron Co.* (1884), 28 Ch. D. 317.

third persons. Thus in *Stubbs* v. *Marsh*,[1] a receiver, appointed by the Court to carry on a newspaper, had to pay damages and costs in respect of a libel which appeared in it during his management. But in all such cases the third person must bring his action in the Court which appointed the receiver.[2]

Lastly, the receiver must account for all moneys which have come into his hands. He must leave his accounts in the chambers of the judge by whom he was appointed, and verify them by an affidavit.[3] He will be liable for all money which he might have received if he had used due diligence; but not for a loss which occurred without any default on his part. He must not mix moneys collected by him as receiver with his own moneys.[4]

### 9. *An Account.*

Where the plaintiff's claim is liquidated and can be ascertained exactly, he should, of course, claim only the precise amount due to him with interest if he is entitled to any. But where the plaintiff believes that the defendant has received money on his behalf and does not know the amount, he naturally desires to make the defendant deliver him an account, showing precisely what money he has received on behalf of the plaintiff and how he has expended it.

Formerly this remedy could only, as a rule, be obtained in the Court of Chancery. It is true that an action lay at common law against a bailiff or receiver, or by one merchant against another in respect of their mutual dealings as merchants, for not rendering a reasonable account of profits. And by the statute 4 Anne, c. 16, s. 27, an action of account might be brought by one joint-tenant or tenant in common against the other, as bailiff, for receiving more than his just share or proportion.[5] But in the face of the extensive jurisdiction of the Courts of Equity in all matters of account, these common law actions became practically obsolete. Now, in either Division of the High Court,[6] a plaintiff may indorse his writ with a claim for an account.

This claim to have an account taken must be carefully distinguished from a claim on a "settled account," which is

[1] (1866), 15 L. T. 312. The damages, it would seem, came out of the estate, but the receiver had to pay the costs out of his own pocket.
[2] *In re Maidstone Palace of Varieties, Ltd.*, [1909] 2 Ch. 283.
[3] Order L., r. 20.
[4] *Smart* v. *Flood* (1883), 49 L. T. 469.
[5] *Henderson* v. *Eason* (1851), 17 Q. B. 701.
*York* v. *Stowers*, [1883] W. N. 174.

really an action brought upon an implied promise.[1] Indeed, in the absence of fraud or of substantial errors in the account, the fact that an account has been settled between the parties is a good defence to a claim to have an account taken. Another defence is that the defendant is under no duty to account to the plaintiff—that is, that he has not received the moneys in question as agent or trustee for the plaintiff, and therefore is not bound to account for them to him, or, in technical language, that he is not "an accounting party."

The procedure on an application for an account will be described in a later chapter.[2] We may mention here a few instances in which an account is generally ordered.

The defendant will be ordered to deliver an account where he has managed the plaintiff's estate, as bailiff, land agent, solicitor or trustee, receiving the rents and profits and making disbursements for rates, taxes and repairs.

Any beneficiary entitled to the residue of a fund under a deed or will is entitled to call upon the trustee or executor to account to him. A solicitor must always account to his client, and an agent to his principal. Where the defendant has been wrongfully in possession of the plaintiff's land or goods, he must account to the plaintiff for all profits made thereby. A claim may also be made for an account of the profits made by the defendant in infringement of the plaintiff's copyright, patent right, or right to a trade mark, &c.; this claim would be supplementary to a claim for an injunction to prevent any further infringement. So in an action for breach of covenant not to trade within a certain area, or for a certain time, an order both for an injunction and for an account is frequently made.

### 10. *Specific Performance of a Contract.*

At common law a plaintiff's only remedy for breach of a contract was an action for damages. In many cases this was, for the purposes of justice, a totally inadequate remedy. But at a later period, when the jurisdiction of the Chancellor became established, many innovations were sanctioned, and among them the granting of decrees for the specific performance of contracts. "This remedy by specific performance was invented and has been cautiously applied in order to meet

[1] See *ante*, p. 940.
[2] *Post*, p. 1198.

cases where the ordinary remedy by an action for damages is not an adequate compensation for breach of contract."[1] Equity, however, could not grant this remedy in all cases of breach of contract. "The jurisdiction" to decree specific performance "has always been treated as discretionary and confined within well-known rules."[2] Gradually out of a long course of decisions of the Court of Chancery there was evolved a body of settled principles and rules which guide our judges at the present day. The most important of these rules may be stated as follows:—

(i.) Specific performance will not be granted where damages would afford adequate compensation. The jurisdiction has always been confined to cases where "damages at law would not give the party the compensation to which he was entitled, that is, would not put him in a situation as beneficial to him as if the agreement were specifically enforced."[3]

In cases of contracts for the sale of ordinary articles of merchandise, damages calculated on the market price of the goods are practically as complete a remedy to the purchaser as delivery of the goods themselves; for with such damages in his pocket he can buy a like quantity of the same goods. "Thus, if a contract is for the purchase of a certain quantity of coals, etc., this Court will not grant specific performance, because a person can go into the market and buy similar articles and get damages for the difference in the price of the articles in a Court of law."[4] For the same reason, if A. agrees to lend B. money, "it is settled in the law of England that such a promise cannot sustain a suit for specific performance."[5] But there are cases in which damages afford no adequate compensation even for the non-delivery of a chattel. Hence the Court will grant specific performance of a contract

[1] *Per* Kay, L. J., in *Ryan* v. *The Mutual Tontine Association*, [1893] 1 Ch. at p. 126.

[2] *Per* Kay, L. J., *ib.*, at p. 121; see also *Stewart* v. *Kennedy* (1890), 15 App. Cas. at p. 105.

[3] *Per* Lord Redesdale, L. C., in *Harnett* v. *Yeilding* (1805), 2 Sch. & Lef. at p. 553; and see *Wolverhampton Corporation* v. *Emmons*, [1901] 1 K. B. 515; *Molyneux* v. *Richard*, [1906] 1 Ch. 34.

[4] *Per* Kindersley, V.-C., in *Falcke* v. *Gray* (1859), 4 Drew. at p. 658.

[5] *Per* Lord Watson in *South African Territories* v. *Wallington*, [1898] A. C. at p. 314.

for the sale of specific chattels such as heirlooms, or chattels of unique value, or of peculiar value to the plaintiff,[1] or even of shares or stock in railway and other public companies, the amount of which is limited and which therefore cannot always be obtained in the market.

Thus in *Paine* v. *Hutchinson*[2] the plaintiffs contracted to sell to the defendant shares in a certain company which they had purchased from C., and which remained in C.'s name. C. executed transfers to the defendant, who made no objection to their form, but eventually refused to execute them. Subsequently an order was made to wind up the company. The Court decreed specific performance of the agreement, and ordered the defendant to concur in all steps that might be necessary and proper for causing the shares to be registered in his name, and also to indemnify the plaintiffs against all expenses which they had incurred or might incur in consequence of the shares not having been registered in the name of the defendant at the proper time.

(ii.) Specific performance will not be granted where the Court would be unable without constant and effective supervision to enforce its judgment.[3] Thus, where in the lease of a flat the lessor covenanted with the lessee to appoint and maintain a resident porter to be in constant attendance and to perform certain specified duties, the Court refused to grant specific performance of this contract on the ground that, "in order to give effect to it by an order for specific performance, the Court would have to watch over and supervise its execution. It is a recognised rule that the Court cannot enforce a contract by compelling specific performance, where the execution of the contract requires such watching over and supervision by the Court."[4]

For the same reason the Courts will not enforce specific performance of a contract for personal services,[5] such as a contract to write a book, or to sing in an opera; for the Court could not compel the defendant to perform either task.

[1] *Duke of Somerset* v. *Cookson* (1735), 3 P. Wms. 390; *Falcke* v. *Gray*, *suprà*.
[2] (1868), L. R. 3 Ch. 388.
[3] *Powell Duffryn Steam Coal Co.* v. *Taff Vale Ry. Co.* (1874), L. R. 9 Ch. 331; but see *Woodruff* v. *Brecon, &c., Ry. Co.* (1884), 28 Ch. D. 190.
[4] *Per* Lopes, L. J., in *Ryan* v. *The Mutual Tontine Association*, [1893] 1 Ch. at p. 125; and see *Wolverhampton Corporation* v. *Emmons*, [1901] 1 K. B. at p. 524.
[5] *Lumley* v. *Wagner* (1852), 1 De G. M. & G. 604; *Johnstone* v. *Shrewsbury Ry. Co.* (1853), 3 De G. M. & G. 914; *Bainbridge* v. *Smith* (1889), 41 Ch. D. 462, 474.

(iii.) Specific performance will not be granted if the party seeking it has by his conduct disentitled himself to relief in equity, or wherever it would be harsh or unreasonable to grant it.[1] The Court exercises a discretion in the matter; it will not grant specific performance where it would be "what is called highly unreasonable to do so. What is more or less reasonable is not a thing that you can define, it must depend on the circumstances of each case."[2] Mere inadequacy of consideration or excess of value is not a sufficient ground for refusing specific performance,[3] but the Court will not enforce a contract into which the defendant was induced to enter by a fraudulent, or even an innocent misrepresentation by the plaintiff, or into which he entered under a mistake of fact which went to the root of the contract, provided such mistake was not caused by want of any reasonable care on his part.[4] Mere silence may also be a ground for refusing specific performance, if it was the duty of the applicant to disclose the fact which he suppressed.[5]

If there be "no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount to legal fraud, however it may be viewed by moralists. But a single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser intended to induce the vendor to believe the existence of a non-existing fact, which might influence the price of the subject to be sold, would be sufficient ground for a Court of Equity to refuse a decree for a specific performance of the agreement."[6]

(iv.) Again, the Court will not enforce any contract for which no consideration was given, or where all consideration has failed. It will not enforce an illegal contract, nor one

[1] *Hexter* v. *Pearce*, [1900] 1 Ch. 341, 346.
[2] *Per* Lord Langdale in *Wedgwood* v. *Adams* (1843), 6 Beav. at p. 605; and see *Preston* v. *Luck* (1884), 27 Ch. D. 497, 506.
[3] *Heywood* v. *Cope* (1858), 25 Beav. 140.
[4] *Tamplin* v. *James* (1880), 15 Ch. D. 215.
[5] *Turner* v. *Green*, [1895] 2 Ch. 205, 209, in which Chitty, J., explains the *dictum* of Lord Manners in *Ellard* v. *Llandaff* (1810), 1 Ball & B. at p. 250.
[6] *Per* Lord Campbell, L. C., in *Walters* v. *Morgan* (1861), 3 De G. F. & J. at pp. 723, 724, cited with approval by Chitty, J., in *Turner* v. *Green*, *supra*; but see the judgment of Lord Hatherley, L. C., in *Phillips* v. *Homfray* (1871), L. R. 6 Ch. at p. 777.

that is uncertain or ambiguous in its terms, or subject to a condition precedent which has not been performed.[1]

(v.) Specific performance of a contract for the sale of land or any interest therein will not, as a rule, be granted unless there is in existence a memorandum of such contract sufficient to satisfy the Statute of Frauds. It will, however, be granted even though the contract was not in writing on proof that—

(a) it was the fraud of the defendant which prevented the contract from being reduced into writing;[2] or

(b) the defendant has expressly admitted the contract, or has not raised the defence of the Statute of Frauds on his pleading;[3] or

(c) the contract refers to the sale of property by the direction of the Court;[4] or

(d) there has been such a part performance of the contract by the plaintiff as is unequivocally referable to the agreement.[5]

(vi.) The Court will not grant specific performance to any person who is not ready and willing, and able, to substantially perform his part of the same contract. It will not do so "unless it can give full relief to both parties."[6] It is true, however, that where on a contract for the sale of land the vendor is able to perform the contract in substance, but not completely, he can, on making compensation for the deficiency in value, obtain a decree for specific performance by the purchaser. But if he cannot perform the contract substantially, then he cannot get specific performance as against the purchaser, although in such a case the purchaser is entitled to get specific performance as against the vendor with an abatement proportionate to the deficiency in value.[7]

[1] See *Williams* v. *Brisco* (1882), 22 Ch. D. at p. 449.
[2] See *Viscountess Montacute* v. *Maxwell* (1720), 1 P. Wms. at p. 616.
[3] Order XIX., r. 15; *James* v. *Smith*, [1891] 1 Ch. 384.
[4] *Blagden* v. *Bradbear* (1806), 12 Ves. 466, 472.
[5] See *ante*, pp. 737—741.
[6] *Per* Lord Cranworth, L. C., in *Blackett* v. *Bates* (1865), L. R. 1 Ch. at p. 124.
[7] *Barker* v. *Cox* (1876), 4 Ch. D. 464.

(vii.) Finally, a plaintiff who seeks a decree of specific performance must not be guilty of unreasonable delay in applying for this relief or in the performance of his part of the contract.[1]

[1] *Mills* v. *Heywood* (1877), 6 Ch. D. 196, 202 ; *Levy* v. *Stogden*, [1899] 1 Ch. 5 ; and see *ante*, pp. 742, 743.

## Chapter XIII.

### EXTRAORDINARY REMEDIES.

We have now dealt with the ordinary remedies which are frequently granted by our Courts. There are, however, other remedies for which application is less frequently made, but which are very valuable in special cases. It is impossible in this work to describe fully the efficacy and operation of these extraordinary remedies or the procedure appropriate to each of them; we can only briefly allude to the most important of them, namely:—

1. The writ of *Habeas Corpus.*
2. The writ of *Mandamus.*
3. The writ of Prohibition.
4. The writ of *Certiorari.*
5. An information in the nature of a writ of *Quo Warranto.*
6. A Petition of Right.
7. A motion against an officer of the Court.

A criminal information may also be regarded as an extraordinary remedy, but with this we have dealt in an earlier chapter.[1]

### 1. *The Writ of Habeas Corpus.*

The writ of *habeas corpus*, which plays so important a part in the constitutional history of our country, is still the most important of the extraordinary remedies which our Courts can be asked to grant. The full name of this writ is *habeas corpus ad subjiciendum.*[2] Its object is to deliver from confinement anyone who is illegally imprisoned. It is a writ issued by the King's Bench Division of the High Court of Justice

[1] *Ante*, pp. 1056—1059.
[2] There are other writs of *habeas corpus, e.g., ad testificandum, cum causâ*, &c.

or by any judge thereof, commanding any person who holds another in custody to bring his prisoner bodily before the Court on a day named in the writ, and then and there to state by what right he holds that other in custody.

Magna Carta laid down long ago that "no man shall be taken or imprisoned unless by lawful judgment of his peers or by the law of the land."[1] The Petition of Right, 1627,[2] contains a provision to exactly the same effect. Yet, in the reign of Charles II., it was found necessary to pass the Habeas Corpus Act.[3] This Act introduced no new principle into the law of England, for the right to a writ of *habeas corpus* existed at common law.[4] But this right had often been rendered inoperative, and, as the Act recites, "many of the King's subjects" had been "long detained in prison in such cases where by law they are bailable, to their great charges and vexation." But the Act of Charles II., though it created the procedure which is still in force, applied only to persons who had "been committed for criminal or supposed criminal matters." Hence the procedure was extended, by the statute 56 Geo. III. c. 100, to all persons under detention of any kind, except those who were imprisoned for debt or by process in any civil suit.

The writ cannot be directed to anyone who at the date of the order is outside the jurisdiction of the High Court. Hence it has, as we have seen,[5] been made an unpardonable crime for anyone unlawfully to take or send any person in his custody outside the realm, so that he would be deprived of the protection of the writ. The Act also provides that a judge who refuses to grant the writ on application made to him for good cause is liable to a penalty of £500.[6] Moreover, any gaoler who refuses to make a return to the writ, or refuses or neglects to deliver within six hours after demand by a prisoner or on his behalf a copy of the warrant or com-

[1] And see 25 Edw. III. st. 5, c. 4: *Darnel's Case* (1627), 3 St. Tr. 1.
[2] 3 Car. I. c. 1.
[3] 31 Car. II. c. 2.
[4] *Thomlinson's Case* (1605), 12 Rep. 104.
[5] *Ante*, pp. 137, 195.
[6] 31 Car. II. c. 2, s. 10.

mitment under which he is detained, is, in certain cases, liable to a penalty of £100 and loss of office, and for a second offence to a penalty of £200.[1]

The procedure on an application for a writ of *habeas corpus* is regulated by Rules 216—230 of the Crown Office Rules, 1906. The writ is granted by the King's Bench Division, or a judge thereof, either by motion or upon application *ex parte*, or upon summons, as the case may be, whenever probable and sufficient ground has been assigned for the interposition of its authority. It lies to any part of the King's dominions not having a Court of justice with authority to issue such writ [2] and to ensure its due execution.[3]

The return to the writ is made by producing the prisoner, and setting forth the grounds and proceedings upon which he is in custody. If the Court considers that the facts set forth in the return are sufficient to justify the prisoner's detention, he is remanded to his former custody; if insufficient, he is discharged therefrom.[4] No appeal lies from an order discharging a person from custody under a *habeas corpus*.[5] An appeal lies from an order directing a writ to issue,[6] and from a refusal to make such order or to order a discharge,[7] provided that the subject-matter of the proceedings in respect of which the application is made be not criminal.[8] A writ of *habeas corpus* will sometimes be quashed on the ground of irregularity or fraud, but not for matter that could not be properly returned to it.[9]

## 2. *The Writ of Mandamus.*

This is one of the high prerogative writs under the common law. It can only be obtained from the King's Bench Division of the High Court of Justice, and on motion, and not in an action.[10] It is a peremptory order by the Court commanding somebody to do that which it is his clear legal duty to do. It will be granted only for some good public purpose;[11] the duty which it enforces must be of a public nature; and the applicant must have a legal right to the performance of such

[1] 31 Car. II. c. 2. s. 5.
[2] See *Ex parte Brown* (1864), 5 B. & S. 280.
[3] 25 & 26 Vict. c. 20, s. 1.
[4] *In re Douglas* (1842), 3 Q. B. 825; *Hammond's Case* (1846), 9 Q. B. 92.
[5] *Cox* v. *Hakes* (1890), 15 App. Cas. 506.
[6] *Ex parte Rev. James Bell Cox* (1887), 20 Q. B. D. 1; see also *R.* v. *Jackson*, [1891] 1 Q. B. 671, n.
[7] *Barnardo* v. *McHugh*, [1891] A. C. 388; *Barnardo* v. *Ford*, [1892] A. C. 326.
[8] *Ex parte Woodhall* (1888), 20 Q. B. D. 832; *In re Keller* (1887), 22 L. R. Ir. 158.
[9] *Carus Wilson's Case* (1845), 7 Q. B. 984, 1001.
[10] Order LIII., r. 4.
[11] See *R.* v. *Bank of England* (1819), 2 B. & Ald. at p. 622.

duty by the party against whom he applies.[1] He must, moreover, have made a demand for its performance, and compliance must have been refused before the writ will be issued.[2]

It is in the discretion of the Court to grant a writ of *mandamus* or not;[3] it will always be refused if the applicant himself be in fault,[4] or where, if granted, it would be nugatory or useless or unnecessary, or where it must ultimately fail. Moreover, it will not be allowed to issue "for the purpose of undoing what has been done," although it will be granted "when that has not been done which a statute orders to be done."[6]

The operation of this writ appears to have been confined originally to a limited class of cases affecting the administration of public affairs, such as the election of corporate officers and their restoration if wrongfully removed from office, or to compel inferior Courts to proceed in matters within their jurisdiction, and public officers to perform duties imposed upon them by common law or by statute. In more recent times, however, the remedy has been extended to other cases. In almost every session of Parliament Acts are passed for making railways, forming docks, building bridges, improving towns, &c., and most of these Acts direct that certain works shall be done for the benefit of individuals, *e.g.*, that communications be made between lands intersected by works authorised by the Act, or that new buildings, bridges or roads be substituted for old ones. In the event of non-compliance with any such enactment, any person who suffers detriment therefrom may apply for a writ of *mandamus*.

This writ will not issue against the Crown or any servant of the Crown,[7] or to any superior Court of record.[8] It will issue to an inferior Court if, having jurisdiction, it refuses to act;[9] but not where that Court has acted. It will not be granted on the ground that in any particular case the Court below has come to an unjust or improper conclusion.[10] Again, the writ may issue to the mayor and assessors of a borough, commanding

[1] *R.* v. *Lewisham Guardians*, [1897] 1 Q. B. 498.
[2] *R.* v. *Bristol and Exeter Ry. Co.* (1843), 4 Q. B. 162.
[3] *R.* v. *All Saints, Wigan* (1876), 1 App. Cas. 611, 620.
[4] *R.* v. *G. W. Ry. Co.* (1893), 62 L. J. Q. B. 572.
[5] *In re Bristol Ry. Co.* (1877), 3 Q. B. D. 10.
[6] *Per* Lord Campbell, C. J., in *Ex parte Nash* (1850), 15 Q. B. at p. 95.
[7] See the remarks of Lord Denman, C. J., in *R.* v. *Powell* (1841), 1 Q. B. at p. 361; *R.* v. *Lords Commissioners of the Treasury* (1872), L. R. 7 Q. B. 387.
[8] *E.g.*, the Central Criminal Court: *R.* v. *Justices of C. C. C.* (1883), 11 Q. B. D. 479.
[9] *R.* v. *Brown* (1857), 7 E. & B. 757.
[10] *R.* v. *Justices of Worcestershire* (1854), 3 E. & B. 477; *R.* v. *Archbishop of Canterbury* (1848), 11 Q. B. 483.

them to revise the burgess list,[1] or to justices of the peace bidding them make a rate or hold a brewster sessions. Sometimes also it is issued in aid of legal proceedings in a superior Court, as by ordering that a creditor of a company should be at liberty to inspect the register of the shareholders with a view to his issuing execution against them.[2]

The duty enforced by this writ may be imposed by common law or custom, by charter or by statute. But it must be a legal duty;[3] an equitable right cannot be enforced by a writ of *mandamus*.[4] And it must be an imperative duty, not a mere discretionary power.

Thus, where a bishop has a discretion as to whether he will issue a commission to inquire into the truth of a complaint under the Church Discipline Act, 1840,[5] no *mandamus* will lie to compel him to do so.[6] Again, where a railway company has an option where its lines cross a highway either to carry the road over the railway or the railway over the road, a *mandamus* will not be granted to compel the company to do one of these two things, unless circumstances are clearly shown which establish the impossibility of the company exercising the option.[7] And generally where a local authority or other public body has vested in it power to do a certain act as in its discretion it may think right, the Court will not issue a *mandamus* to compel it to do or not to do that act, so long as it has exercised its discretion honestly.[8]

The writ is intended to afford a remedy in those cases only where no other appropriate remedy exists; it will not issue where there is any other legal mode of enforcing the right which is equally convenient, beneficial and effective.[9] It will be granted where the party has a right to have anything done and has no other specific means of compelling its performance.[10] "When there is no specific remedy, the Court will grant a *mandamus* that justice may be done."[11]

[1] See *Mayor of Rochester* v. *R.* (1858), E. B. & E. 1024.
[2] *R.* v. *Derbyshire, &c., Ry. Co.* (1854), 3 E. & B. 784; *R.* v. *Harrison* (1846), 9 Q. B. 794; and see *Davies* v. *Gas Light and Coke Co.*, [1909] 1 Ch. 708.
[3] *R.* v. *G. W. Ry. Co.* (1893), 62 L. J. Q. B. 572.
[4] *R.* v. *Godolphin* (1838), 8 A. & E. 338.
[5] 3 & 4 Vict. c. 86, s. 3.
[6] *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214; see also *R.* v. *Bishop of Oxford* (1879), 4 Q. B. D. 525.
[7] *R.* v. *S. E. Ry. Co.* (1853), 4 H. L. Cas. 471.
[8] *Smith* v. *Chorley Rural Council*, [1897] 1 Q. B. 678.
[9] *In re Nathan* (1884), 12 Q. B. D. 461; *R.* v. *Lambourn Valley Ry. Co.* (1888), 22 Q. B. D. 463; *R.* v. *Registrar of Joint Stock Companies* (1888), 21 Q. B. D. 131; *R.* v. *Assessment Committee of City of London Union*, [1907] 2 K. B. 764.
[10] See *Mayor of Rochester* v. *R.* (1858), E. B. & E. 1024, 1031, 1033.
[11] *Per* Lord Mansfield, C. J., in *R.* v. *Bank of England* (1780), 2 Douglas, at p. 526.

But a writ of *mandamus* will issue although another remedy does exist, if it be not adequate or complete, as where a statutory right of appeal exists but does not afford so complete or adequate a remedy as a *mandamus*.[1] So where, though a remedy was provided under a local statute, the procedure and remedy was uncertain, inconvenient and practically obsolete, it was held that a *mandamus* ought to be granted.[2] And in a case in which an election petition might have been brought, a *mandamus* was granted as being a more convenient, speedy and effective remedy.[3]

The procedure on an application for a prerogative writ of *mandamus* is regulated by Rules 49—69 and 125 of the Crown Office Rules, 1906. The writ is issued in the King's name out of the King's Bench Division, and the application for it must be made on motion, and supported by affidavit. The writ, in the first instance, commands the party to whom it is addressed to do the act required, or make a return thereto by showing cause why he does not do it;[4] and unless he does the act or succeeds in quashing the writ as insufficient on the face of it, he must proceed to answer the writ or demur to it: if judgment is given against him, the Court awards a peremptory *mandamus*, and in cases of private injury, damages and costs.[5] Disobedience to a peremptory *mandamus* is punishable by writ of attachment or by committal, as well as by an order for the payment of costs.

### 3. *The Writ of Prohibition.*

The writ of prohibition issues out of the King's Bench Division of the High Court of Justice, and is directed to the judge of an inferior Court, or the parties to a suit therein, or both conjointly, requiring that the proceedings which have been commenced there be either conditionally stayed or peremptorily stopped. The object of the writ is to keep the Court to which it is directed within its proper jurisdiction, or to repress the assumption of authority by any pretended Court. Moreover, a writ of prohibition will issue to restrain a judge of any inferior Court, spiritual or temporal, from hearing any case in which he is personally interested.[6]

The writ of prohibition will issue to an Ecclesiastical Court, whenever something is being done by it "contrary to the general law of the land, or

[1] *R.* v. *Stepney Borough Council*, [1902] 1 K. B. 317.
[2] *R.* v. *Vestry of St. George the Martyr, Southwark* (1892), 61 L. J. Q. B. 398.
[3] *R.* v. *Stewart*, [1898] 1 Q. B. 552.
[4] See *R.* v. *Commissioners of Southampton* (1861), 1 B. & S. 5.
[5] *R.* v. *S. E. Ry. Co.* (1853), 4 H. L. Cas. 471.
[6] *Dimes* v. *Grand Junction Canal Co.* (1852), 3 H. L. Cas. 759; *R.* v. *Farrant* (1887), 20 Q. B. D. 58.

manifestly out of the jurisdiction of the Court." [1] Thus, if an Ecclesiastical Court meddle with a matter purely temporal, civil or criminal, or with a wrong for which at common law there is a remedy, it oversteps its jurisdiction. "Where the common or statute law giveth remedy *in pro saeculari* (whether the matter be temporal or spiritual), the conusance of that cause belongeth to the King's temporal Courts only." [2] Where the spiritual Court errs in the construction of a statute, or where a suit therein is "determined contrary to the right at common law," the remedy is by prohibition.[3] "The Courts of common law have, in all cases in which matter of temporal nature has incidentally arisen, granted prohibition to Courts acting by the rules of the civil law, where such Courts have decided on such temporal matters in a manner different from that which the Courts of common law would decide upon the same." [4] But where the spiritual Court has sole jurisdiction, its proceedings need not be governed by the rules of the common law.

Prohibition to the temporal Courts is limited to those cases where they act either without or in excess of their jurisdiction,[5] or where any member of the Court is interested. Thus the writ will not lie in respect of mere irregularities which may have occurred in the proceedings of the inferior Court, nor because the judge, in deciding any particular question properly before him, has erred in his judgment upon the law.[6]

Any judge of the High Court, as well during the sittings as in vacation, can hear and determine applications for writs of prohibition and make such orders for the issuing of such writs as might have been made by the High Court.[7] The procedure on any such application is regulated by Rules 70, 71 and 126 of the Crown Office Rules, 1906. As soon as the writ is issued, all proceedings in the inferior Court must be suspended by those to whom it is directed upon pain of attachment. But a writ of prohibition can be set aside by a writ of *supersedeas*.[8]

## 4. *The Writ of Certiorari.*

The writ of *certiorari* is issued for the purpose of removing a suit from an inferior Court into the High Court of Justice.

[1] *Per* Littledale, J., in *Ex parte Smyth* (1835), 3 A. & E. at p. 724. In early times indeed one of the main uses of the writ of prohibition was to restrain the jurisdiction of the Ecclesiastical Courts: see Coke, 2nd Inst., tit. "Articuli Cleri;" *In re Dean of York* (1841), 2 Q. B. 1; *Gorham* v. *Bishop of Exeter* (1850), 15 Q. B. 52; *Martin* v. *Mackonochie* (1881), 6 App. Cas. 424; *R.* v. *Bishop of St. Albans* (1882), 9 Q. B. D. 454.

[2] Coke upon Littleton, 96 b, and see *Phillimore* v. *Machon* (1876), 7 P. D. 481.

[3] Comyns' Digest, Prohibition, G. 23; cited with approval by Lord Ellenborough, C. J., in *Gould* v. *Gapper* (1804), 5 East, at p. 366; and see *Enraght* v. *Lord Penzance* (1882), 7 App. Cas. 240.

[4] *Per* Lord Ellenborough, C. J., in *Gould* v. *Gapper*, *suprà*, at p. 371.

[5] *Worthington* v. *Jeffries* (1875), L. R. 10 C. P. 379, 387, 388.

[6] See *Mayor, &c., of London* v. *Cox* (1866), L. R. 2 H. L. 239; *R.* v. *Local Government Board* (1882), 10 Q. B. D. 309.

[7] See the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 127.

[8] *R.* v. *Furrant* (1887), 20 Q. B. D. 58, 62.

It is directed to the judge or officers of the inferior Court, commanding him or them to return the record of a cause there depending, to the end that more sure and speedy justice may be done between the parties. The right of thus removing a cause exists at common law, but has from time to time been limited to some extent by statute. The remedy, as a rule, is only applicable where it is sought to review a judicial act and not a merely ministerial act of an inferior tribunal.

"The writ of *certiorari* is a very ancient remedy, and is the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction. In certain cases the writ of *certiorari* is given by statute, but in a large number of cases it rests on the common law. It is frequently spoken of as being applicable only to 'judicial acts,' but the cases by which this limitation is supposed to be established show that the phrase 'judicial act' must be taken in a very wide sense, including many acts that would not ordinarily be termed 'judicial.' For instance, it is evidently not limited to bringing up the acts of bodies that are ordinarily considered to be Courts. . . . The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as, for instance, to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by *certiorari*. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law." [1]

Thus a writ of *certiorari* was allowed to issue to remove into the High Court an order made by a Court of quarter sessions stopping up a highway, on the ground that the necessary notices had not been affixed in the places required by law.[2] On the other hand, in *R.* v. *Sharman*,[3] the Queen's Bench Division refused a writ to bring up an order of justices granting a licence to an hotel on the ground that the original grant of such a licence was not a judicial act, as no controversy exists at that stage of the proceedings. But the confirming authority, whose confirmation is, under the provisions of the Licensing Acts, necessary to the validity of certain classes of new licences, sit as a Court; and therefore, if a licence granted to a person not qualified by law to hold it or in other respects granted without jurisdiction is confirmed by them, a writ of *certiorari* will lie to bring it up to be quashed.[4]

The Crown has an absolute right to a writ of *certiorari*. Hence in criminal cases the writ issues as of course whenever

[1] *Per* Fletcher Moulton, L. J., in *R.* v. *Woodhouse*, [1906] 2 K. B. at pp. 534, 535.
[2] *R.* v. *Justices of Surrey* (1870), L. R. 5 Q. B. 466.
[3] [1898] 1 Q. B. 578; and see *Boulter* v. *Kent Justices*, [1897] A. C. 556.
[4] *R.* v. *Justices of Manchester*, [1899] 1 Q. B. 571; followed in *R.* v. *Justices of Sunderland*, [1901] 2 K. B. 357.

the Attorney-General applies for it on behalf of the Crown.[1] But an ordinary prosecutor must show good cause before the writ will issue. "It is quite clear that, except when applied for on behalf of the Crown, the *certiorari* is not a writ of course. The Court must be satisfied on affidavits that there is sufficient ground for issuing it, and it must in every case be a question for the Court to decide whether, in fact, sufficient grounds do exist." [2] The grounds most frequently urged in a criminal case are that a fair and impartial trial cannot be had in the Court below,[3] or that the defendant is a corporation,[4] or that some question of law of more than usual difficulty and importance is likely to arise upon the trial,[5] or that a special jury,[6] or a view of the premises in respect to which the indictment is preferred,[7] is required for a satisfactory trial.

In civil cases a writ of *certiorari* issued as of right at common law to remove an action from any inferior Court to the High Court.[8] But this wide power has been restricted in most cases by statute.[9] In quasi-civil cases the writ of *certiorari* will not issue as a matter of course; the applicant must show that he has some special grievance of his own, and must not apply merely as one of the public.[10]

The procedure on an application for a writ of *certiorari* is regulated by Rules 12—31 of the Crown Office Rules, 1906. An affidavit must be filed in support of the application, except when the application is on behalf of the Crown, or when the party applying is the prosecutor of an indictment against a corporate body. The application is made to the Divisional Court by motion. In criminal cases the writ of *certiorari* is issued out of the Crown Office Department of the Central Office, and is tested by the Lord Chief Justice. It is directed in the King's name to the judges or officers

[1] *R.* v. *Thomas* (1815), 4 M. & S. 442.
[2] *Per cur.* in *R.* v. *Justices of Surrey* (1870), L. R. 5 Q. B. at p. 472; see also *R.* v. *Londonderry Justices*, [1905] 2 Ir. R. 318.
[3] *R.* v. *Bell* (1859), 8 Cox, 287; *R.* v. *Boughton*, [1895] 2 Ir. R. 386.
[4] See *post*, p. 1405.
[5] *R.* v. *Wartnaby* (1835), 2 A. & E. 435; *R.* v. *Joule* (1836), 5 A. & E. 539.
[6] *R.* v. *Jeffs* (1845), 9 Jur. 580.
[7] Crown Office Rules, 1906, r. 13.
[8] *Edwards* v. *Corporation of Liverpool* (1902), 86 L. T. 627.
[9] See, for instance, s. 126 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), *ante*, p. 1020. As to removal from the Mayor's Court, see *Davies* v. *MacHenry* (1867), L. R. 3 Ch. 200; and from the Liverpool Court of Passage, see *Edwards* v. *Corporation of Liverpool* (1902), 86 L. T. 627.
[10] *R.* v. *Justices of Surrey* (1870), L. R. 5 Q. B. 466.

of the inferior Court, ordering them to return the indictment, inquisition, judgment, conviction or order, as the case may be, to the King's Bench Division. If the High Court should consider that a cause has been improperly removed, it may issue a writ of *procedendo*, commanding the inferior Court to proceed, or the writ of *certiorari* may be quashed on motion.

### 5. *An Information in the Nature of a Writ of Quo Warranto.*

This is the proper remedy for trying disputes between private parties as to the authority by which an office or franchise is held, and for removing those who have improperly assumed to exercise either. A proceeding of this kind is now deemed to be a civil proceeding.[1] It takes the place of the ancient writ of *Quo warranto*, now obsolete, which was a writ of right of the Crown, issuing out of the Court of King's Bench, and which lay only in respect of an usurpation of the rights or prerogative of the Crown.[2] The modern proceeding by information in the nature of a writ of *Quo warranto* "will lie for usurping any office, whether created by charter alone or by the Crown with the consent of Parliament, provided the office be of a public nature and a substantive office—not merely the function or employment of a deputy or servant held at the will and pleasure of others; for with respect to such an employment, the Court certainly will not interfere, and the information will not properly lie."[3] The procedure is regulated by Rules 40—48, 123, 124, of the Crown Office Rules, 1906.

### 6. *A Petition of Right.*

"The King can do no wrong;"[4] hence no action can be brought against him. A subject can only seek redress against the Crown by a petition of right, which is now almost invariably brought under the Petitions of Right Act,

[1] Judicature Act, 1884 (47 & 48 Vict. c. 61), s. 15.
[2] *King* v. *Shepherd* (1791), 4 T. R. 381; *Frost* v. *Mayor of Chester* (1855), 5 E. & B. 531.
[3] *Per* Tindal, C. J., in *Darley* v. *R.* (1846), 12 Cl. & F. at pp. 541, 542.
[4] See *post*, p. 1415.

1860.[1] A petition of right lies where the Sovereign is in possession of any land, chattel, or money to which the petitioner claims a better title, and therefore seeks restitution or compensation. Again, where the petitioner has a claim for any debt arising out of a contract, such as a claim for goods supplied to the Crown or for the public service,[2] he may also proceed by way of petition of right. So, where a subject has a claim against the Crown for damages, whether liquidated or unliquidated, arising out of a breach of contract,[3] he may resort to this method of redress, whether such breach is occasioned by the omissions or positive acts of servants of the Crown.[4] But engagements between the Crown and those in military and naval service are voluntary on the part of the Crown, and afford no ground for a petition of right.[5] A petition of right, moreover, will not lie in respect of a claim founded on a tort committed either by the Crown or by any servant of the Crown in the alleged performance of his duty.[6] "A petition of right which complains of a tortious act done by the Crown, or by a public servant by the authority of the Crown, discloses no matter of complaint which can entitle the petitioner to redress. As in the eye of the law no such wrong can be done, so in law no right to redress can arise; and the petition, therefore, which rests on such a foundation, falls at once to the ground. . . . A servant of the Crown," however, "is responsible in law for a tortious act done to a fellow-subject, though done by the authority of the Crown."[7]

A petition of right is addressed to the King and intituled in that Division of the High Court to which the matter would have been appropriate if it had been a dispute between subject and subject. It must set forth the facts on which the petitioner bases his claim to relief, and must be signed

[1] 23 & 24 Vict. c. 34. The old procedure by petition of right under the common law and by *monstrans de droit* is expressly preserved by s. 18 of the Act, but it is practically obsolete.

[2] See *Feather* v. *R.* (1865), 6 B. & S. at p. 294; and *Windsor and Annapolis Ry. Co.* v. *R. and Western Counties Ry. Co.* (1886), 11 App. Cas. at pp. 614, 615.

[3] *Thomas* v. *R.* (1874), L. R. 10 Q. B. 31.

[4] *Windsor and Annapolis Ry. Co.* v. *R. and Western Counties Ry. Co., supra.*

[5] *Mitchell* v. *R.* (1890), 6 T. L. R. 332.

[6] *Tobin* v. *R.* (1864), 16 C. B. N. S. 310; and see *Raleigh* v. *Goschen*, [1898] 1 Ch. 73.

[7] *Per cur.* in *Feather* v. *R.* (1865), 6 B. & S. at pp. 295—297.

by him and by his counsel or solicitor.[1] The petition must be left with the Home Secretary, who will submit it to His Majesty for his *fiat* "that right be done."[2] It must be sealed with the seal of the Home Office and afterwards filed at the Writ Department of the Central Office of the High Court of Justice.[3] One sealed copy must be left at the office of the Solicitor to the Treasury, indorsed as required, and praying for a plea or answer on behalf of the Crown within twenty-eight days.[4] The petition is then transmitted to the particular department to which its subject-matter relates.

If the petition be presented for the recovery of real or personal property which has been alienated by the Crown, a copy of such petition and *fiat* must be served upon the person in possession of the property in order that he may have the opportunity of putting in a defence to the petition.[5] Either the Crown or such person in possession may also raise a point of law by demurrer.[6]

### 7. *A Motion Against an Officer of the Court.*

The High Court of Justice does not in general on summary application adjudicate between the parties upon rights which can be duly investigated in an ordinary action. To this rule, however, the Court will in its discretion make exceptions, the most important of which is perhaps the rule that the Court has plenary jurisdiction over its own officers, and in a proper case will exercise that jurisdiction summarily if acts of misconduct be brought to its notice. To punish, "by attachment, misconduct or disobedience in its officers" would seem to be the main object for which the Court interferes summarily.[7]

A solicitor is an officer of the Court, and in that character amenable to its surveillance. He may, therefore, be compelled in a summary way to do his duty to the Court and to his client—and in former days also to his articled clerk.[8] He may thus on motion be punished for gross negligence or other professional misconduct. He may be called upon to show cause why he should not be struck off the rolls or compelled to answer the matter contained in a certain affidavit. These

[1] 23 & 24 Vict. c. 34, s. 1.
[2] *Ib.*, s. 2.
[3] See Annual Practice, 1911, Vol. II., p. 1060.
[4] 23 & 24 Vict. c. 34, s. 3.
[5] *Ib.*, s. 5.
[6] *Ib.*, s. 6.
[7] See the remarks of Coleridge, J., in *In re Hilliard* (1845), 2 D. & L. at pp. 920, 921; and *In re Freston* (1883), 11 Q. B. D. 545; *In re Dudley* (1883), 12 Q. B. D. 44.
[8] See *Ex parte Bayley* (1829), 9 B. & C. 691; *In re Thompson* (1848), 1 Exch. 864.

are not criminal proceedings, but matters within the inherent jurisdiction of the Court.[1] In these matters the Court is now assisted by the Disciplinary Committee of the Law Society.[2] But the Court will not interfere summarily to compel payment of money or the restitution of deeds detained by a solicitor, unless the deeds or moneys were received by him whilst acting in the character of a solicitor for the applicant.[3]

[1] *In re Hardwick* (1883), 12 Q. B. D. 148.
[2] See the Solicitors Act, 1888 (51 & 52 Vict. c. 65), ss. 12—15; and *post*, p. 1444.
[3] *Ex parte Cobeldick* (1883), 12 Q. B. D. 149.

## Chapter XIV.

### THE WRIT OF SUMMONS.

An action was defined by Sir E. Coke as "the legal demand of a man's right."[1] But the word has now a somewhat narrower meaning; for it has been defined by the Judicature Act, 1873, as "a civil proceeding commenced by writ, or in such other manner as may be prescribed by rules of Court."[2] It therefore includes nearly every proceeding in the King's Bench and Chancery Divisions of the High Court of Justice, and also all Admiralty and Probate proceedings.

The procedure in the High Court of Justice is mainly regulated by the Judicature Acts of 1873 and 1875, and by the "Rules of the Supreme Court," which are made by the judges under powers conferred on them by these enactments, and have all the force and effect of a statute. These rules are divided according to their subject-matter into 78 "Orders," and are generally referred to thus—"Order III., r. 6."

There are many proceedings in the High Court which are not actions. In divorce matters the former procedure is retained, and the suit is commenced by a "petition." So are bankruptcy proceedings, and applications to wind up an insolvent company, or under the Trustee Act, 1893.[3] These proceedings, therefore, are not actions; nor are criminal proceedings in the King's Bench Division which are commenced by information or indictment. There are also many matters which come before the Court on what is called a "motion," *i.e.*, a summary application made to the Court, not necessarily in any action. Thus, in the case of a motion for a writ of *habeas corpus*, *mandamus*, or prohibition, or to attach a person who has committed a contempt of Court, or to set aside or vary an award, or to strike a solicitor off the rolls, though notice of the application must of course be given to the person affected, no writ or petition is served on him. Again, an arbitrator, or referee, or an inferior Court may state a

[1] Co. Litt. 285, a.
[2] 36 & 37 Vict. c. 66, s. 100.
[3] 56 & 57 Vict. c. 53.

"special case" in order to obtain the opinion of the High Court on a matter of law. The practice with regard to petitions, motions and special cases is necessarily different from the procedure in actions, and it is therefore not included in this work.

The rest of this chapter is confined to "actions" in the narrower meaning of that term.

In all litigation the first step is to summon into Court the party against whom the proceedings are taken. For this purpose the plaintiff in an action in the High Court of Justice must employ one or other of two slightly different documents, either "a writ of summons," or "an originating summons." [1] The difference between these two documents will be explained hereafter.[2] The vast majority of actions in the High Court is commenced by a writ of summons, which for shortness is usually called a writ.

A writ is a formal document, addressed to the defendant, by which the King commands him to "enter an appearance" within so many days, otherwise judgment will be signed against him. The writ must in the first place be drafted; this is done by the plaintiff or his solicitor. Next the writ must be issued; this is done by an officer of the Court. Lastly, the writ must be served; this is done by a clerk of the plaintiff's solicitor or by a professional process-server. It must state six different things:—

(i.) The nature of the claim made, or the relief or remedy required in the action.[3] It is not, however, essential that the writ should set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled.[4] He may in every case indorse his writ *generally*. There are six cases enumerated in Order III., r. 6, in which he may, if he wishes, endorse his writ *specially* with a full statement of claim.[5] The plaintiff may also indorse

[1] The language of Order II., r. 1, is misleading. It says: "Every action in the High Court shall be commenced by a writ of summons." This is untrue. It should run: "Every action in the High Court shall be commenced either by a writ of summons or by an originating summons."

[2] See *post*, pp. 1182, 1183.

[3] Order II., r. 1.

[4] Order III., r. 2.

[5] See *post*, Chap. XVI.

his writ with a claim for an account,[1] or for trial without pleadings.[2]

(ii.) The name and residence of each plaintiff and defendant.

(iii.) The name and place of business of the plaintiff's solicitor, if he employs one.

(iv.) The Division of the High Court in which the plaintiff intends to sue. If the action be to recover a debt or damages it will, as a rule, be brought in the King's Bench Division; but certain matters, as we have seen, are expressly assigned to other Divisions of the High Court.[3]

(v.) "An address for service"—an address, that is, at which notices and all other written communications may be left for him.

(vi.) If he is suing, or if any one of the defendants is sued, in a representative capacity (*e.g.*, as trustee of the estate of some bankrupt, or as the executor or administrator of some one deceased), this also must be stated on the writ. If the plaintiff be a woman, the writ should state whether she is a "widow" or a "spinster," or the "wife of A. B."

All these matters must be inserted on the writ before it is issued.

A writ, which is generally indorsed, is usually in the following form. On the face of it will appear :—

1910.—S.—No. 717.

IN THE HIGH COURT OF JUSTICE.
KING'S BENCH DIVISION.

BETWEEN FLORA SMITH . . . . . PLAINTIFF,

AND

CHARLES BROWN . . . . . DEFENDANT.

GEORGE THE FIFTH, by the Grace of God, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, To *Charles Brown*, of 56, *Cheapside*, in the *City* of *London*. WE COMMAND YOU, That within Eight Days after the Service of this Writ on you, inclusive of the day of such Service, you do cause an Appearance to be entered for you in an Action at the Suit of *Flora Smith the wife of John Smith*. And take notice that in default of your so doing the Plaintiff may proceed therein, and Judgment may be given in your absence.

Witness, ROBERT THRESHIE, BARON LOREBURN, Lord High Chancellor of

[1] See *post*, p. 1197.
[2] See *post*, p. 1199.
[3] See *ante*, pp. 1007—1012. Should a mistake be made in selecting a Division of the High Court to which the action is assigned, a transfer of the action to some other Division may be ordered, otherwise all proceedings in the action will be taken in the Division specified in the writ.

Great Britain, the 30*th* day of *May*, in the year of Our Lord One thousand nine hundred and *ten*.

N.B.—This Writ is to be served within TWELVE Calendar Months from the date thereof, or, if renewed, within SIX Calendar Months from the date of the last renewal, including the day of such date, and not afterwards.

The defendant may appear hereto by entering an Appearance, either personally or by Solicitor, at the Central Office, Royal Courts of Justice, London.

On the back of the writ will be printed or written :—

*The Plaintiff is a married woman, suing in respect of her separate estate.*
*The Defendant is sued as executor of the late John Robinson, and also in his own right.*
*The Plaintiff's claim is for £———, balance of moneys received by the said John Robinson during his lifetime, and by the Defendant since his death, to the use of the Plaintiff,*
*And for an Account,*
*And for a Receiver.*

This Writ was issued by *W. F. JONES*, of *and* whose Address for Service is 29, *Fleet Street, London, E.C.*, Solicitor for the said Plaintiff, who resides at 107, *Fitzjohn's Avenue, Hampstead, N.W.*

This Writ was served by me at 56, *Cheapside, London, E.C.*, on the Defendant on *Tuesday*, the 31*st* day of *May*, 1910.

Indorsed the 31*st* day of *May*, 1910.

(Signed) *C. LANE,*
(Address) 29, *Fleet Street, London, E.C.*

## *Issuing the Writ.*

As soon as the writ is prepared and its indorsement duly drafted, the next step is to "issue" it; that is, to make it an official document, emanating from the Court. Most writs are issued out of the Central Office at the Royal Courts of Justice in London. But as we have seen, a plaintiff (except in a probate action) may, if he wishes, issue his writ out of a District Registry.[1] The plaintiff or his solicitor takes two copies of the proposed writ either to the Central Office or to a district registry, signs one copy, and pays ten shillings. The officer impresses a ten shilling stamp on the signed copy, and files it; he stamps the other with what is called a seal, and hands it back; this then becomes the writ in the action, and bears the date of the day on which it is issued. If the action is to be tried in the Chancery Division, the writ will, at the same time, be marked with the name of one of the six

[1] See *ante*, pp. 998, 999.

judges of that division, to whom the action is thenceforth assigned.

There are two cases in which leave to issue a writ is necessary :—

(i.) Where the defendant is not in England. No writ that the plaintiff intends to have served on any person abroad will be issued, unless the plaintiff first obtains the leave of a judge ; and such leave will only be granted in the cases specified in Order XI.

(ii.) Where the plaintiff seeks to join on his writ different causes of action which may not be joined without leave. See, for instance, Order XVIII., rr. 2, 3 ; under these rules it is sufficient if the plaintiff obtains leave to join such claims from a Master.

### *Service of the Writ.*

When the writ has been issued and sealed it must be served on the defendant, unless his solicitor agrees in writing to accept service and to enter an appearance for him.[1] Service is made by delivering a copy of the writ to the defendant personally, and at the same time showing him the original if demanded. Should, however, the plaintiff be unable to effect prompt personal service, he may apply to a Master for an order for "substituted service," *e.g.*, by serving the defendant's partner, solicitor, steward, or agent, or by giving him notice of the writ by registered letter or by advertisement in the newspapers.[2] The mode of serving the writ on particular defendants and in particular actions is specified in Order IX. In an action to recover land, where the premises are wholly deserted and void, service of the writ, when it cannot otherwise be effected, may be made by posting a copy of it on the door of the dwelling-house or other conspicuous part of the property in question.[3]

If the defendant be out of jurisdiction, then, if he be a British subject, he can be served with the original writ ; but, if a foreigner, he can be served only with notice of the writ. Service of the writ itself on a foreigner when he is not in British dominions is of no effect in law.[4]

[1] Order IX., r. 1. A solicitor, who does not enter an appearance in pursuance of his written undertaking so to do, will be liable to attachment : Order XII., r. 18.
[2] Order IX., r. 2.
[3] Order IX., r. 9.
[4] Order XI., rr. 6—8.

The writ of summons remains in force for twelve calendar months from the date when it is issued, and must be served within that period, unless the plaintiff can obtain leave to renew it for a further period. The Master will not grant such leave unless he is satisfied that reasonable efforts have been made to serve the defendant. The writ cannot be renewed if the Statute of Limitations has run so as to bar the debt or claim.[1]

Where the plaintiff, suing in an action in the High Court, proves by evidence on oath to the satisfaction of a judge, at any time before final judgment, that he has a good cause of action against the defendant to the amount of £50 or upwards, and that there is probable cause for believing that the defendant is about to quit England unless he be apprehended; and that the absence of the defendant from England will materially prejudice the plaintiff in the prosecution of his action,[2] such judge may order the defendant to be arrested and imprisoned for a period not exceeding six months, unless and until he has sooner given security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the Court. The defendant cannot be kept in prison after final judgment has been signed.[3]

## *Appearance.*

As soon as a defendant has been served with a writ, he must make up his mind whether he will defend the action or not. If he decides to do so he must promptly enter an appearance. This is done by the defendant or the clerk of his solicitor, who hands to the proper officer at the Central Office or district registry two copies of a memorandum in writing bearing the date of the day on which he delivers it. One copy the officer retains; the other he seals with his official stamp, and returns to the person entering the appearance. The memorandum must state the name and address of the defendant's solicitor, if he has one, or, if not, of the defendant; and must give an address for service, at which letters and notices may be left for him. By so appearing, the defendant submits to the jurisdiction of the Court.[4] He must on the same day give notice to the plaintiff or his solicitor that he has appeared, and send him the copy of the

[1] *Doyle* v. *Kaufman* (1877), 3 Q. B. D. 7, 340; *Hewett* v. *Barr*, [1891] 1 Q. B. 98.

[2] That is to say, that his evidence is absolutely necessary, not that judgment cannot be realised if he goes. The plaintiff must disclose the facts which the defendant can prove, so that if he admits them no order will be made (32 & 33 Vict. c. 62, s. 6).

[3] *Hume* v. *Druyff* (1873), L. R. 8 Ex. 214.

[4] Unless he appears "under protest."

memorandum which the officer sealed, as a certificate that he really has appeared on the day indicated by the seal.

If the plaintiff has issued his writ out of the district registry and the defendant resides or carries on business within the district of such registry, the writ of summons must direct the defendant to cause an appearance to be entered at that registry.[1] But should the defendant neither reside nor carry on business within such district, the writ must inform him that he may cause an appearance to be entered at his option either at the district registry or at the central office.[2]

If the defendant appears, or any of the defendants appear, in London, the action will proceed there unless the Court or a judge be satisfied that the defendant so appearing is a merely formal defendant or has no substantial cause to interfere in the conduct of the action.

The appearance ought regularly to be entered within the time named on the writ. A defendant may, however, appear at any time before judgment has been signed against him; though, if he do so after the time limited for appearance, he will not, unless otherwise ordered, be entitled to any further time for delivering his defence, or for any other purpose, than if he had appeared according to the writ.[3] Partners sued in the name of their firm must appear individually in their own names. But all subsequent proceedings will continue in the name of the firm.[4]

### *Default of Appearance.*

The writ usually commands the defendant to enter an appearance within eight days after the service of the writ upon him, inclusive of the day of such service. But when any defendant is out of the jurisdiction of the Court, the time allowed for appearance is not necessarily eight days, but generally a longer period determined by the distance of the locality in which the defendant is or is supposed to be. If the defendant does not enter an appearance within the period named on the writ, the plaintiff is, as a rule, on filing an affidavit that the writ has been properly served, entitled to enter "judgment in default of appearance." But if the plaintiff omits or delays to enter judgment, the defendant may still enter an appearance, although the period prescribed has elapsed.[5] Where the writ is (or might have been)

[1] Order XII., r. 4.
[2] *Ib.*, r. 5.
[3] Order XII., r. 22.
[4] Order XLVIIIA, r. 5.
[5] Order XII., r. 22.

specially indorsed, and the defendant does not appear, the plaintiff may enter final judgment for the full amount claimed on the writ, and costs. If the action be for the recovery of land, the plaintiff is entitled to a judgment that he shall recover possession of the land. If the action be for damages or the return of a chattel, the plaintiff is not entitled to final judgment; he can only have what is called an interlocutory judgment—a judgment, that is, in his favour, but with no amount stated. The amount of damages or the value of the chattel must be subsequently assessed by a jury or by an Official Referee,[1] or ascertained in any way in which a question arising in an action may be tried. The Master may order a statement of claim or particulars to be filed before the assessment. The defendant, although he has not appeared, may attend and argue and call evidence at the assessment. And then the plaintiff may enter final judgment for the amount so assessed.[2]

But where the action is of such a kind that originally it could only have been brought in the Court of Chancery (*e.g.*, a claim for an injunction to restrain a nuisance or a breach of covenant) the procedure is different. The plaintiff is not at this stage allowed to enter any judgment, either final or interlocutory, although the defendant has not appeared. The plaintiff must at first proceed as if the defendant had appeared. He must prepare a statement of claim. But he does not deliver it to the defendant; he files it in the offices of the Court.[3] If the defendant still does not appear, the plaintiff, after waiting ten days, can move the Court for judgment in default of defence. The statement of claim will stand admitted, and the plaintiff will obtain such judgment as he is entitled to on the assumption that every word contained in his pleading is true.[4]

[1] See *ante*, pp. 999 *et seq.*
[2] See Order XIII., rr. 1—11.
[3] Order XIII., r. 12.
[4] Order XXVII., r. 11.

*Originating Summons.*

We have seen that most actions in the High Court of Justice are commenced by a writ. But an action can in every Division of the High Court be also commenced by an originating summons, which is defined as "a summons other than a summons in a pending cause or matter."[1] This summons is disposed of privately by a judge sitting in chambers and not in open Court.

For example, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons to a judge of any Division of the High Court for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested.[2] The question to be determined must be clearly stated on the summons itself; it must be a question of law, not of fact.[3] The judge may direct such persons to be served with the summons as he may think fit. The application must be supported by such evidence as the judge may require, though the parties generally agree on a "statement of facts." But the judge is not bound to determine any such question of construction in chambers, if in his opinion it ought not to be determined on originating summons but by an action commenced in the usual way, in which formal pleadings can be delivered and evidence given in open court.

There are many other cases in which the procedure by originating summons may be usefully employed. Any person interested in any estate or trust may thus apply to have any question arising in the administration of such estate or trust determined, without the necessity of having the whole estate or trust generally administered.[4] Applications may also be made by originating summons for foreclosure or redemption of mortgaged property,[5] for an order to sell a debtor's interest in land delivered in execution,[6] for the appointment of new trustees or a vesting order,[7]

[1] Order LXXI., r. 1A.
[2] Order LIVA, r. 1.
[3] *Lewis* v. *Green*, [1905] 2 Ch. 340.
[4] Order LV., r. 3.
[5] *Ib.*, r. 5A.
[6] *Ib.*, r. 9A.
[7] *Ib.*, r. 13A.

for the maintenance of infants, and under the following Acts of Parliament :—

The Lands Clauses Act, 1845.[1]
The Vendor and Purchaser Act, 1874.[2]
The Conveyancing Act, 1881.[3]
The Married Women's Property Act, 1882.[4]
The Settled Land Acts, 1882—1890.[5]
The Mortmain Act, 1891.[6]
The Judicial Trustee Act, 1896.[7]

But a general declaration of title ought rarely to be made on a vendor and purchaser summons, such summons being intended for the decision of isolated points arising out of and connected with the contract.[8]

The most important difference between a writ and an originating summons is this,[9] that the use of the latter form of document implies that the parties (or some of them) desire to have the matter discussed in chambers and not in open court. The great advantage of this mode of procedure is that the parties obtain an early decision from the judge without the expense and delay of pleadings, though the matter is often adjourned from chambers into court.

[1] 8 & 9 Vict. c. 18.
[2] 37 & 38 Vict. c. 78.
[3] 44 & 45 Vict. c. 41.
[4] 45 & 46 Vict. c. 75.
[5] 45 & 46 Vict. c. 38; 47 & 48 Vict. c. 18; 50 & 51 Vict. c. 30; 53 & 54 Vict. c. 69.
[6] 54 & 55 Vict. c. 73.
[7] 59 & 60 Vict. c. 35.
[8] *In re Wallis and Barnard's Contract*, [1899] 2 Ch. 515.
[9] An originating summons, however, cannot be served out of the jurisdiction : *In re Bousfield, Whaley and Bousfield* (1886), 32 Ch. D. 133.

## Chapter XV.

### PROCEDURE WHERE THE WRIT IS GENERALLY INDORSED.

In the majority of actions commenced in the High Court of Justice the plaintiff states the nature of his claim on the back of his writ in a concise form, which is called a general indorsement. Such an indorsement is little more than a label which indicates the class of action to which the suit belongs; it is "not essential to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled."[1] There is one exception: in actions of libel a general indorsement must "state sufficient particulars to identify the publications in respect of which the action is brought."[2]

One instance of a general indorsement has already been given;[3] others are subjoined:—

*Assault.*

The plaintiff's claim is for damages for an assault upon him made by the defendant on February 17, 1910.

*Libel.*

The plaintiff's claim is for damages for a libel contained in the *Blankshire Gazette*, dated December 10, 1909, being an article headed "Wolves in Sheep's Clothing," in the third column of page 7 of the issue of that date.

*Trespass.*

The plaintiff's claim is for £200 damages for the defendants' wrongful entry upon the plaintiff's land known as Long Acre, East Grinstead, in the county of Sussex; and for an injunction restraining the defendants, their servants and agents, from entering on the plaintiff's said land or from otherwise interfering with the plaintiff's use and enjoyment thereof.

[1] Order III., r. 2.
[2] *Ib.*, r. 9.
[3] *Ante*, pp. 1176, 1177.

*Summons for Directions.*

This is a summons by means of which the Master is asked to give directions with respect to any of the proceedings in the action from appearance to trial. It is taken out under Order XXX., which has no application until the defendant has entered an appearance. As soon as the defendant has entered an appearance in any action[1] commenced by a writ generally indorsed, the provisions of Order XXX. apply, and the plaintiff must promptly take out a "summons for directions." And because the plaintiff must, the defendant may not, take out this summons. All that the defendant can do, if the plaintiff neglects to take out a summons, is to wait for fourteen days after the entry of his appearance, and then he can take out a summons for an order to dismiss the action, on the hearing of which the Master may either dismiss the action on such terms as may be just, or may deal with the application in all respects as if it were a summons for directions.[2] Moreover, the plaintiff must take out a summons for directions before he takes any fresh step in the action other than an application for an injunction or for a receiver, or the entering of judgment in default of defence under Order XXVII.: these are all applications of great urgency.

On the first application under a summons for directions no affidavit is used, except by special order. The Master accepts the statements of the parties or their solicitors or counsel as to the nature of the action, the proposed line of defence, and the assistance they respectively need to enable them properly to prepare for trial. And though the plaintiff alone can take out the summons, all parties must at the hearing, so far as practicable, apply for any directions which they desire. The Master, too, may give whatever directions he thinks right, though neither party has asked for them. However, on the first hearing of the summons it is not possible to think of everything that may prove necessary at a later stage of the

[1] Except in an Admiralty action.
[2] Order XXX., r. 8.

proceedings. Hence it is provided that application for further directions may be made subsequently by any party who needs them. He must reinstate the original summons in the Master's list, and give two clear days' notice in writing to the other party stating what it is he wants. But he may be ordered to pay the costs of the subsequent application, if the Master thinks that such further directions ought properly to have been asked for on the first hearing.

Many various matters are dealt with by the Master on a summons for directions :—

*Pleadings.*—The most important and most frequent of the questions which come before the Master on this summons is "Shall there or shall there not be pleadings?" As a rule, the plaintiff cannot deliver a statement of claim without the order of a Master; and after a summons for directions has been taken out, the defendant cannot deliver a defence without the order of a Master.

*Particulars.*—If any pleading does not give the other party the information to which he is entitled, he may apply for "particulars," that is, a statement in writing supplementing the defective pleading and giving the details omitted. Such details ought, of course, to have been given in the original pleading.

*Evidence.*—On this summons also the Master deals with all questions as to interrogatories and discovery of documents.[1] Again, it may be necessary to have the evidence of some person abroad taken on commission or under letters of request, or to have a witness who is dangerously ill or about to go abroad examined here before the trial,[2] or to obtain a copy of an entry in a banker's book under the Bankers' Books Evidence Act, 1879.[3] A very wide power—unfortunately but little used—is given to a Master on the hearing of a summons for directions. He may "order that evidence of any particular fact shall be given by statement on oath of information and belief, or by production of documents or entries in

[1] See *post*, pp. 1228—1237.
[2] See *post*, pp. 1239, 1240.
[3] 42 Vict. c. 11, *post*, p. 1234.

books, or by copies of documents or entries, or otherwise," as he may direct.[1]

*Accounts.*—On this summons, too, the Master will order the delivery of an account under Order XV.[2] or the usual partnership accounts. And indeed in any cause or matter at any stage of the proceedings a judge or Master may direct any necessary accounts to be taken, notwithstanding that there may be some further relief sought for, or some special issue still to be tried.[3]

*Security for Costs.*—The defendant may in certain cases ask for an order to compel the plaintiff to give security for the costs of the action; *e.g.*, where the plaintiff resides permanently abroad, and has no substantial property, real or personal, in England. But the mere fact that the plaintiff is insolvent, or is a married woman, is not sufficient ground for such an order.

*Stay of Proceedings.*—Again, on a summons for directions, the Master has power to stay all proceedings, if the action be frivolous and vexatious,[4] or should have been brought elsewhere,[5] or if the plaintiff's mode of conducting the action be oppressive and vexatious, or if he has not paid the costs of a previous action brought on the same cause of action, or if the matter in dispute be one which the parties had agreed to refer to arbitration.[6] The Master will also on this summons dismiss an action for want of prosecution.

*Place of Trial.*—In every action in every Division the place of trial is now fixed by the Master.[7] He will, as a rule, fix it in the place which he deems least expensive and most convenient for both parties and to the majority of the witnesses on both sides. But if either party can satisfy him that it would be unfair to fix the trial there, because his opponent is especially popular or powerful in that neighbourhood, or

[1] Order XXX., r. 7.
[2] See *post*, p. 1198.
[3] Order XXXIII., r. 2.
[4] *Reichel* v. *Magrath* (1889), 14 App. Cas. 665; *Remmington* v. *Scoles*, [1897] 2 Ch. 1; *Critchell* v. *L. & S. W. Ry. Co.*, [1907] 1 K. B. 860.
[5] *Logan* v. *Bank of Scotland* (No. 2), [1906] 1 K. B. 141.
[6] Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 4.
[7] Order XXXVI., r. 1.

because for any other reason there would not be a fair trial there, the Master will direct that the action shall be tried in some other place where the jury will be impartial.

*Mode of Trial.*—The parties have a right to demand trial by jury in certain cases.[1] In all other cases it rests entirely with the Master to determine the mode of trial.

A summons for directions must be served on all parties to the action who may be affected by it not less than four days before the day named in it for the hearing of the application. The form of the summons is as follows:—

1910.—*B.*—No. 136.

IN THE HIGH COURT OF JUSTICE.
KING'S BENCH DIVISION.
BETWEEN *ARTHUR BROWN* . . . . PLAINTIFF,
AND
*CHARLES DUKE* . . . . DEFENDANT.

Let all parties concerned attend the Master in Chambers, Royal Courts of Justice, Strand, London, on *Wednesday*, the 30th day of *January*, 1910, at 1.30 o'clock in the *afternoon*, on the hearing of an application on the part of the *Plaintiff* to show cause why an Order for Directions should not be made in this Action as follows:—

Pleadings *to be delivered*

Particulars. That the
deliver within days particulars of
and that in default all further proceedings in this Action be stayed until such particulars are delivered (or, that the Defendant be precluded from giving evidence in support thereof on the trial of the Action), and that the have
days to deliver his
after delivery of such particulars.

Admissions.

Discovery. That the *Defendant* file an affidavit of documents in ten days.

Interrogatories. For leave to interrogate the *Defendant*. Answers to be filed within ten days.

Inspection of documents.

Inspection of real or personal property.

Commission. *To Gibraltar to examine witnesses.*

Examination of witnesses.

Place of trial. *Middlesex.*

Mode of trial. *Special Jury.*

Any other interlocutory matter or thing.

Dated the 24*th* day of *January*, 1910.

This summons was taken out by *Messrs. L., M. & Co.*, of ——, Solicitors for *Plaintiff*.

To *X. Y.*,
of ——,
Solicitor for *Defendant*.

See Order XXXVI., rr. 2—9, and *post*, pp. 1243, 1244.

The form of the order is as follows :—

1910.—*B.*—No. 136.

IN THE HIGH COURT OF JUSTICE.
KING'S BENCH DIVISION.
MASTER *ARCHIBALD*, Master in Chambers.
BETWEEN *ARTHUR BROWN* . . . . . PLAINTIFF,
AND
*CHARLES DUKE* . . . . . DEFENDANT.

UPON HEARING the Solicitors on both sides, the following directions are hereby given, and it is Ordered—

That there be pleadings in the action as follows :—Statement of Claim containing full particulars to be delivered in 10 days from this date. Defence containing full particulars in 14 days from delivery of Statement of Claim. Reply if Counterclaim in 10 days after delivery of Defence.

That the Plaintiff and Defendant do, respectively after delivery of Defence and within 10 days after service of copy receipt for deposit in Court, answer on affidavit stating what documents are or have been in their possession or power relating to the matters in question in this action.

Inspection of Documents upon usual notice.

That the action be tried in Midd'esex.

That the action be tried with Judge alone unless plaintiff gives notice with notice of trial requiring jury or by defendant 4 days after.

Liberty to either party to apply.

And that the costs of this application be costs in the cause.

Dated the 30*th* day of *January*, 1910.

In commercial cases, directions are usually given by the judge in charge of the commercial list, and not by a Master. His order is frequently in the following form :—

UPON HEARING the Solicitors on both sides, the following directions are hereby given, and it is Ordered—

That the action be placed in the Commercial List.

That Points of Claim be delivered by the Plaintiffs in four days.

That Points of Defence be delivered by the Defendants in four days.

That lists of documents be exchanged between the parties in seven days, and inspection be given within three days afterwards.

That the action be tried without a jury.

That the date of trial be fixed for *March 4th*, 1910.

That the costs of this application be costs in the cause.

## Chapter XVI.

### PROCEDURE WHERE THE WRIT IS SPECIALLY INDORSED.

A PLAINTIFF can only specially indorse his writ in six cases. These are stated in Order III., r. 6, which runs as follows :— "In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—

(A.) Upon a contract, express or implied (as, for instance, on a bill of exchange, promissory note or cheque, or other simple contract debt) ; or

(B.) On a bond or contract under seal for payment of a liquidated amount of money ; or

(C.) On a statute where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty ; or

(D.) On a guaranty, whether under seal or not, where the claim against the principal is in respect of a debt or liquidated demand only ; or

(E.) On a trust ; or

(F.) In actions for the recovery of land, with or without a claim for rent or mesne profits, by a landlord against a tenant[1] whose term has expired or has been duly determined by notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant."

Even in these six cases the plaintiff is not compelled to specially indorse his writ, though as a rule he is only too glad to avail himself of the privilege, as it may lead to his obtaining judgment more speedily. He may, if he prefers, indorse his writ generally, or for an account, or for trial without pleadings.

[1] This includes a tenant at will : *Pilkington* v. *Power*, [1910] 2 Ir. R. 194.

But he must put an indorsement of some kind to state the nature of the action, otherwise the defendant would not know why he was sued.

The sixth and last case will be dealt with later on in the Chapter on Procedure in Actions for the Recovery of Land.[1] We will only deal here with the first five cases. In these, it will be observed, the claim arises on a contract, express or implied, or under a statute, or on a trust—never on a tort; and in each case the claim must be for "a debt or liquidated demand in money." The indorsement must state the precise amount claimed for debt, for interest if any payable, and for costs, and must also inform the defendant that, on payment of these amounts, further proceedings will be stayed.

A few words may be necessary to explain the meaning of the phrase "a debt or liquidated demand in money payable by the defendant." These words exclude from the operation of the rule any action for unliquidated damages, that is to say, any action in which the amount of the verdict depends upon all the circumstances of the case and on the conduct of the parties, and is fixed by opinion or conjecture. In such cases one cannot say positively beforehand whether the jury will award the plaintiff a farthing or forty shillings, or a hundred pounds. Merely inserting a figure on the writ (*e.g.* "and the plaintiff claims £500 damages") will not make such a claim liquidated. But whenever the amount to which the plaintiff is entitled (if he is entitled to anything) can be ascertained by calculation or fixed by any scale of charges, or other positive *data*, it is said to be "liquidated" (*i.e.* "made clear"), and the writ can be specially indorsed.

It is not necessary that a fixed sum should have been expressly agreed on at the date of contract; if no price or remuneration was then fixed, the plaintiff will be paid whatever is regular and usual, according to prices current in the trade, or the scale of fees recognised in the profession. And generally a claim on a *quantum meruit* may be specially indorsed.[2]

A solicitor's bill of costs, for instance, is a liquidated demand, although it is subject to taxation.[3] A writ may be specially indorsed with a claim for arrears of rent, but not for damages for breach of a covenant to repair. Damages for wrongful dismissal are unliquidated, because the plaintiff may have obtained a better situation within a week of his dismissal. If A. agrees to complete certain work for B. by a specified date or in default to pay £5 per week "as liquidated damages" till the work is completed, then, if this payment is in fact liquidated damages and

[1] See *post*, p. 1245.
[2] *Lagos* v. *Grunwaldt*, [1910] 1 K. B. 41, 48.
[3] *Smith* v. *Edwardes* (1888), 22 Q. B. D. 10.

not a penalty, it can be claimed on a specially indorsed writ.[1] A claim against the separate estate of a married woman may be specially indorsed.[2]

A special indorsement must contain full particulars with dates and items sufficient to inform the defendant specifically what is the claim that is made against him. It must state concisely all material facts necessary to constitute a complete cause of action. It is a statement of claim, and should be so headed;[3] it should also be signed by the counsel or solicitor who drafted it. Such heading and signature are important, for they make it clear to the defendant that the plaintiff has not only served him with a writ of summons to which he must appear, but has also delivered to him a statement of claim to which he must plead.[4] The plaintiff thus delivers a pleading without first obtaining the leave of a Master (which, as we have seen, he cannot do when the writ is generally indorsed). No further statement of claim can be delivered.[5] If the plaintiff subsequently desires to amplify the statement indorsed on his writ, he must deliver an "Amended Statement of Claim"; this he can do once without leave.[6]

Thus, the indorsement must expressly state the contract on which the plaintiff sues, and show that the defendant is liable thereunder. It is of no avail to set out such contract in an affidavit under Order XIV., if it is not stated in the indorsement. But it will be sufficient if the indorsement refers to some account already rendered which contains the necessary particulars. A claim for interest may be included in a special indorsement, provided facts be also alleged which show that the plaintiff is entitled to such interest. If the plaintiff sues for the balance of an account due, the defendant is entitled to know how the balance claimed is arrived at. A claim for rent must state the dates at which the rent claimed fell due. In any action on a bill of exchange, promissory note or cheque, full particulars of the amount and date of the negotiable instrument, and of the parties thereto, must be given on the writ. But a special indorsement need not contain an averment that a condition precedent has been duly performed.[7]

A few precedents of special indorsements may help to explain these rules:—

[1] *Toomey* v. *Murphy*, [1897] 2 Ir. R. 601.
[2] *Scott* v. *Morley* (1887), 20 Q. B. D. 120; *Downe* v. *Fletcher and wife* (1888), 21 Q. B. D. 11.
[3] *Cassidy & Co.* v. *McAloon* (1893), 32 L. R. Ir. 368.
[4] A pleading is "delivered;" a writ, summons or notice of motion is "served."
[5] Order XX., r. 1 (a).
[6] Order XXVIII., r. 2.
[7] Order XIX., r. 14; *Bradley* v. *Chamberlyn*, [1893] 1 Q. B. 439.

No. 1.

*Action on a Butcher's Bill.*

[R. S. C., Appendix C., sect. iv.][1]

STATEMENT OF CLAIM.

The plaintiff's claim is for the price of goods sold and delivered.

Particulars :—

| | | £ | s. | d. |
|---|---|---|---|---|
| 1898. 31st December. | | | | |
| | Balance of account for butcher's meat to this date, full particulars of which have been delivered | 35 | 10 | 0 |
| 1899. 1st January to 31st March. | | | | |
| | Butcher's meat, full particulars of which have been delivered, and exceed three folios | 74 | 5 | 0 |
| | | 109 | 15 | 0 |
| 1899. 1st February. | Paid | 45 | 0 | 0 |
| | Balance due | £64 | 15 | 0 |

*Signed*, JOHN SMITH,
*Plaintiff's Solicitor.*

No. 2.

*Action on a Bill of Exchange.*

(*Indorsee against Acceptor.*)

STATEMENT OF CLAIM.

1. The plaintiff's claim is for £308 12*s.* 10*d.*, principal, interest and notarial expenses, payable by the defendant to the plaintiff on a bill of exchange for £300, dated February 1, 1910.

2. The said bill was on that day drawn on the defendant by one Frederick Brown, payable three months after date to James Robinson, or order.

3. On February 2, 1910, the defendant accepted the said bill. On April 20, 1910, James Robinson indorsed the said bill to the plaintiff. Yet the defendant has not paid the same.

*Particulars.*

| 1910. | | £ | s. | d. |
|---|---|---|---|---|
| May 4th. | Principal due | 300 | 0 | 0 |
| | Interest to date | 8 | 11 | 4 |
| | Noting | 0 | 1 | 6 |
| | Total | £308 | 12 | 10 |

The plaintiff also claims interest on £300 of the above sum at £5 per cent. from date hereof until payment.

*Signed*, RICHARD ROE.

No. 3.

*Action on a Guarantee.*

STATEMENT OF CLAIM.

1. On February 9, 1910, one Silvanus Smith applied to the plaintiff to supply him with certain goods on credit.

2. On February 15, 1910, the defendant wrote a letter to the plaintiff in which he agreed that, if the plaintiff would supply Silvanus Smith with the said goods on credit, he would be responsible to the plaintiff for the due payment of their price.

[1] By R. S. C., "Appendix A." or "B," or "C," is meant one or other of the Appendices of Precedents of Writs, Notices or Pleadings, which are attached to the Rules of the Supreme Court of November, 1883.

3. The plaintiff accordingly supplied Silvanus Smith with the said goods, the prices of which amount to £175 10*s.*

[*Here should follow particulars of the said goods with dates, items, and prices.*]

4. Neither Silvanus Smith nor the defendant has paid the plaintiff the said sum of £175 10*s.*, or any part thereof, and the plaintiff claims £175 10*s.*

*Signed*, JOSEPH GRANT.

## *Order XIV.*

But the chief benefit, which a plaintiff derives from specially indorsing his writ either in the King's Bench Division or in the Chancery Division, is that by so doing he is enabled to apply for summary judgment under Order XIV. This Order only applies where the defendant has entered an appearance to a specially indorsed writ. The plaintiff (or some one else familiar with the facts [1]) must make an affidavit verifying the cause of action and stating that in his belief there is no defence to it. He must then serve on the defendant a copy of this affidavit, and of any exhibits attached to it and a summons calling on him to show cause why the plaintiff should not be at liberty to enter final judgment for the full amount claimed on the writ together with interest and costs. Thereupon, unless the defendant can satisfy the Master that he has a good defence to the action, an order will be made empowering the plaintiff to enter judgment accordingly. The application cannot be heard until four clear days after the service of the summons on the defendant. He may show cause against it by affidavit or by offering to bring money into Court. The Master may allow the defendant to be examined upon oath.

On the hearing of the application the Master has four courses open to him :—

(i.) He may give leave to the plaintiff to enter final judgment forthwith for the full amount claimed on the writ with interest, if any due, up to date of judgment and certain fixed costs. But this power should only be exercised in cases where the plaintiff's right to recover is practically undisputed. If to a portion of the plaintiff's claim no defence is shown in

[1] An affidavit by the plaintiff's solicitor will not be sufficient, if he can only speak from information and belief : *Lagos* v. *Grunwaldt*, [1910] 1 K. B. 41.

the defendant's affidavit, the plaintiff may have judgment forthwith for that portion of his claim and the defendant will be allowed to defend as to the residue. Judgment may be entered under Order XIV. against a firm, even though one of the partners be an infant.[1] It may also be obtained against a married woman;[2] but in this case the judgment must be drawn up in the form prescribed in *Scott* v. *Morley*.[3]

(ii.) He may give the defendant leave to defend, subject to conditions, such as paying money into Court or giving security. This course is only taken where the defendant's affidavit discloses a defence, which is of a shadowy or doubtful nature. If the defendant pays the money into Court or gives security within the time prescribed, the action will proceed in the ordinary way.

(iii.) If, however, the facts alleged by the defendant in his affidavit or by his own *viva voce* evidence or otherwise, do amount to a defence to the action, either in fact or law, he is entitled to unconditional leave to defend. It is enough that there is a *bonâ fide* question to be tried, and the Master should give unconditional leave, even though he may think that the defendant will ultimately fail.[4] The defendant is not bound in his affidavit to show a good defence on the merits; a technical defence, such as the Statute of Limitations, is sufficient. But it must be a defence. An affidavit merely pleading poverty, or showing hardship, or a remedy over against a third person, will not avail. A general statement, "I do not owe the money," or a vague suggestion of fraud or other misconduct, will not suffice.[5] Where the defendant has no defence, but a good counterclaim for a larger amount than the claim, the plaintiff is entitled to have judgment on his claim, but execution will be stayed until after the trial of the counterclaim.

[1] *Harris* v. *Beauchamp* (No. 1), [1893] 2 Q. B. 534.
[2] *Downe* v. *Fletcher and wife* (1888), 21 Q. B. D. 11; *Axford* v. *Reid* (1889), 22 Q. B. D. 548.
[3] (1887), 20 Q. B. D. 120.
[4] *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L. T. 262; *Wells* v. *Allott*, [1904] 2 K. B. 842; *Dott* v. *Bonnard* (1904), 21 Times L. R. 166; *Codd* v. *Delap* (1905), 92 L. T. 510.
[5] See *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. at p. 697.

(iv.) Lastly, the Master may, with the consent of the parties, himself then and there dispose of the action finally and without appeal. Or with the like consent he may make an order referring the action to a Master, in which case an appeal lies from the decision of that Master to a Divisional Court.[1]

Where leave, whether conditional or unconditional, is given to defend, the Master has power to give all such directions as to the further conduct of the action as can be given on a summons for directions under Order XXX. He may order the action to be set down for trial without further pleadings; and, if he is of opinion that a prolonged trial will not be requisite, he may direct that it shall be entered in the special list of short causes under Order XIV., r. 8, and be tried either with or without a jury.[2] He may not, however, restrict the defences which the defendant may raise at the trial.[3] Nor will the defendant at the trial be restricted to the defences disclosed in his affidavit.

An order made under Order XIV. that the plaintiff be at liberty to enter final judgment for his claim places him at once in the position of a secured creditor;[4] and as soon as he enters judgment in pursuance of the leave thus given him, he becomes a judgment creditor.[5] No second action can ever be brought on the same cause of action. Hence a plaintiff should specially indorse his writ whenever he has a fair chance of obtaining summary judgment. But if there is no reasonable prospect of his obtaining summary judgment, the plaintiff should not take out a summons under Order XIV. He is not bound to do so merely because his writ is specially indorsed. Order XIV. is only intended to apply to cases where there is no substantial dispute as to the facts or the law. If he applies for summary judgment where there is an obvious defence to the action, his summons will be dismissed with costs.

[1] *Fraser* v. *Fraser*, [1905] 1 K. B. 368.
[2] See *Macartney* v. *Macartney* (1909), 25 Times L. R. 818.
[3] *Langton* v. *Roberts* (1894), 10 Times L. R. 492.
[4] *In re Ford*, [1900] 2 Q. B. 211.
[5] *In re Gurney*, [1896] 2 Ch. 863.

There are many cases, then, in which a plaintiff who has specially indorsed his writ, does not take out a summons under Order XIV. He can, if he wishes, take out a summons for directions under Order XXX. He need not take out any summons at all. When he served his writ, he delivered a statement of claim. To this statement of claim the defendant must plead within ten days from the time limited for appearance, unless such time is extended by order or consent, or unless in the meantime the plaintiff serves a summons for judgment under Order XIV. or a summons for directions. As soon as either of these summonses is served on him, the defendant must hold his hand and wait to see what order the Master will make at the hearing. But if neither summons be taken out, the defendant must deliver his defence within ten days from the time limited for appearance;[1] otherwise the plaintiff can enter judgment in default of defence. To this defence it will generally be unnecessary for the plaintiff to deliver a reply;[2] he can give notice of trial within four days after the defence has been delivered, and he can then at once enter the case for trial—a most expeditious procedure.

We have now dealt with the procedure when the writ is—

(i.) Generally,

(ii.) Specially, indorsed.

There are two other kinds of indorsements occasionally employed, to each of which belongs a procedure of its own:—

(iii.) An indorsement for an account;

(iv.) An indorsement for trial without pleadings.

### (iii.) Indorsement for an Account.

If the plaintiff knows the precise amount which is owing to him from the defendant, he will as a rule specially indorse his writ with a claim for that amount. But it often happens that the plaintiff has no means of knowing what is the exact

[1] Order XXI., r. 6. He can do so without the leave of a Master.

[2] See *post*, p. 1222.

sum due to him, and he requires information from the defendant in order to ascertain it. If, for instance, the defendant is a rent-collector, or a commercial traveller, or any other agent or trustee, who has received moneys on behalf of the plaintiff, he is bound within a reasonable time after demand to render an account of all such moneys, showing how much he has paid over to the plaintiff and how much he still has in hand. Such an agent is called "an accounting party." In order to obtain such an account from the defendant, the plaintiff should indorse his writ with a claim to have an account taken under Order III., r. 8. This might run as follows:—"The plaintiff's claim is for an account of all moneys received by the defendant to the use of the plaintiff as his rent-collector and general agent and for payment of the amount found due on taking such account."

The procedure, when such an account is claimed, is regulated by Order XV. If the defendant does not appear to such a writ, an order for the account claimed will be forthwith made as of course; if he does appear, the order will nevertheless be made, unless the defendant can show that he is not an accounting party, or that he has already fully accounted, or that there is some other preliminary question to be tried. The application for such order may be made at any time after the time for entering an appearance has expired; if the defendant has appeared, it must be made on a summons for directions. If an order be made on such an application, the account may be taken by a Master, or a District Registrar, or by a special referee or an official referee.[1] The first step generally is for the defendant to deliver an account. This the plaintiff proceeds to criticise. If he can show that the defendant has taken credit for payments which he never made, he can have the items struck out; that is called "falsifying." If he can show that the defendant has received moneys with which he has not debited himself, the plaintiff can have these items added; that is called "surcharging."

[1] See the Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 13, 14; *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196; and *ante*, pp. 962, 999—1002.

When this process has been exhausted, the Master or referee will have arrived at a correct account, and can then make an order that the defendant shall pay the plaintiff the balance shown by such account to be due to him.

(iv.) Indorsement for Trial without Pleadings.

If a plaintiff desires to proceed promptly to trial and is willing to dispense with pleadings altogether, he may adopt the procedure provided in 1893 by Order XVIIIA. But it is not always wise to dispense with pleadings; and in fact few plaintiffs have availed themselves of this procedure, especially since the amendment of Order XXX. made in 1897, which leaves it in the Master's discretion to determine whether there shall be pleadings or not. If, however, the plaintiff decides to dispense with pleadings, he must indorse on his writ "a statement sufficient to give notice of the nature of his claim, and of the relief or remedy required in the action" —something more precise than a general indorsement, yet not with all the detail necessary in a pleading—and add the words "if the defendant appears, the plaintiff intends to proceed to trial without pleadings."

To the writ so indorsed, the defendant appears in the ordinary way. No summons for directions is necessary; though either party can take one out if he wishes. The plaintiff, within ten days after appearance, gives twenty-one days' notice of trial without pleadings.

The defendant, however, may wish to have pleadings delivered. He cannot claim this as a right; but he may, within ten days after appearance, apply by summons for the delivery of a statement of claim. On such summons the Master may make any order which he would have power to make on a summons for directions. He may order that a statement of claim be delivered, in which case the action will proceed in the usual manner; or he may order particulars in lieu of pleadings to be delivered by either party. Only the defendant can take out such a summons; the plaintiff is bound by his election, stated on the writ, to proceed to trial

without pleadings; and without an order made on such a summons, neither party can deliver a pleading. Where the defendant has taken out such a summons and particulars have been ordered, each party will be bound by the particulars which he delivers; but if no order as to particulars has been made, all defences will be open at the trial to the defendant. But where a defendant has not taken out such a summons, he will not be allowed to rely at the trial on a set-off or counter-claim, or on the defence of infancy, coverture, fraud, Statute of Limitations, or discharge under the Bankruptcy Acts, unless within ten days after appearance he gives notice to the plaintiff, stating the grounds and particulars upon which he relies.

## Chapter XVII.

### PLEADINGS.

### *The Function of Pleadings.*

In most actions of tort and in any action of contract in which the facts are complicated, or in which difficult points of law may arise, the Master will order pleadings to be interchanged between the parties. There are many good reasons why he should do this. The defendant is entitled to know what it is that the plaintiff alleges against him; the plaintiff in his turn is entitled to know what defence will be raised in answer to his claim. The defendant may dispute every statement made by the plaintiff, or he may be prepared to prove other facts which put a different complexion on the case. He may rely on a point of law, or raise a cross-claim of his own. In any event, before the trial comes on it is highly desirable that the parties should know exactly what are the matters in dispute; otherwise they may go to great expense in procuring evidence to prove at the trial facts which their opponents will at once concede. On the other hand, if they assume that their opponents will not raise a particular point, they may be taken by surprise at the trial.

Moreover, it is necessary to ascertain the nature of the controversy in order to determine the most appropriate mode of trial. It may turn out to be a point of pure law, which should be decided by a judge or by the Court; it may involve a lengthy investigation of complicated accounts, in which case the action should be at once referred to a special or official referee; or it may be a question proper for a jury. It is also desirable to place on record what are the precise questions raised in the action, so that the parties or their successors may not fight the same battle over again.

It has been found by long experience that the most satisfactory method of securing these advantages is to make each party in turn state his own case, and answer that of his opponent before the hearing. Such statements and the replies to them are called the pleadings. The plaintiff naturally begins; if he has not already specially indorsed his writ, he will in a proper case readily obtain leave to deliver a separate statement of claim. Whenever the writ is generally indorsed and the defendant has appeared, the plaintiff cannot, except in an Admiralty action, deliver a statement of claim without the leave of a Master, which he must obtain on a summons for directions.[1] Leave will generally be given at the same time to the defendant to put in his defence, which, besides answering the plaintiff's claim, may also set up a counterclaim. The plaintiff sometimes obtains leave to deliver a reply; if a counterclaim has been pleaded he will obtain leave to deliver a reply and defence to counterclaim.[2]

Each of these alternate pleadings must in its turn either admit or deny the facts alleged in the last preceding pleading, besides alleging additional facts, where necessary. The points admitted by either side are thus extracted and distinguished from those in controversy; and thus the litigation is narrowed down to two or three matters which are the real questions in dispute. The pleadings should always be conducted so as to evolve a clearly defined "issue"—that is, some definite proposition of law or fact, asserted by one party and denied by the other, but which both agree to be a point which they wish to have decided in the action.

[1] A plaintiff, who has specially indorsed his writ under Order III., r. 6, delivers a statement of claim without leave when he serves his writ. And the defendant may sometimes plead to such a special indorsement (see *post*, p. 1217) without leave. Moreover, Order XXX. only applies to the delivery of pleadings after appearance. Hence, whenever it is necessary for a plaintiff to deliver a statement of claim under Order XIII., r. 12, although the defendant has not appeared (see *ante*, p. 1181), he can do so without leave; and the defendant can subsequently appear and deliver a defence thereto without leave. Other instances, in which a pleading can be delivered without leave, will be found under Order XXI., r. 14, and Order XXIV., r. 2; but these rarely occur.

[2] Further pleadings are possible, though unusual; they would be called Rejoinder, Surrejoinder, Rebutter, Surrebutter. What is now called a statement of claim was before 1875 called a declaration; a defence was termed a plea or pleas; and a reply was called a replication.

The time within which each successive pleading is to be delivered is also as a rule fixed by the Master when he gives leave for it to be pleaded. If no time be thus fixed the pleadings must be delivered within the times prescribed by the Rules of Court.[1] Such times may, however, be enlarged by a Master under Order LXIV., r. 7, or by consent of the parties without application to a Master under r. 8 of the same Order. Every pleading must be signed by the counsel or solicitor who drafted it, or by the party himself if he sues or defends in person. The pleadings are interchanged between the parties; they are not deposited or filed in Court;[2] they are not seen or read by the Master unless the opposite party raises some question about them on which he desires the Master's decision. No technical objection can, however, now be raised to any pleading on the ground of any alleged want of form. But "the Court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass, or delay the fair trial of the action."[3]

The function, then, of pleadings is to ascertain with precision the matters on which the parties differ and the points on which they agree. Each party must give his opponent a clear and definite outline of his case; though he need not disclose the evidence by means of which he hopes to establish it. Each party in turn must either admit or deny every material fact alleged in the preceding pleading. Both parties thus learn before the case comes into Court what are the real points to be discussed and decided at the trial. The fundamental rule of our present system of pleading is this:—

"Every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved."[4]

### *Material Facts.*

Every pleading must contain only the material facts on which the party pleading relies. Every fact is material which is essential to the plaintiff's cause of action or to the

[1] Viz.:—A statement of claim within 21 days after appearance (Order XX., r. 1 (c)); a defence within ten days after the delivery of the statement of claim (Order XXI., r. 8) a reply within ten days after the delivery of the defence, whether it contains a defence to a counterclaim or not (Order XXIII., r. 2); and any subsequent pleading within four days after the delivery of the previous pleading (Order XXIII., r. 3).

[2] Except in cases falling within Order XIII., r. 12; see *ante*, p. 1181.

[3] Order XIX., rr. 26, 27.

[4] Order XIX., r. 4.

defendant's defence—which they must prove or fail. Neither party, it is true, "need in any pleading allege any matter of fact which the law presumes in his favour." [1] But, subject to this, each party must always state his whole case. He must plead all the material facts on which he means to rely; otherwise he is strictly not entitled to give any evidence of them at the trial. The statement of claim must disclose a good cause of action; the defence must show a good answer to the statement of claim. No averment must be omitted which is essential to success. If a plaintiff's cause of action, or his title to sue, depends on a statute, he must plead all facts necessary to bring him within that statute. The general rule is thus stated by Cotton, L. J.:—"In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial." [2]

The question whether a particular fact is or is not material depends mainly on the special circumstances of the particular case. Sometimes it is material to allege and prove that the defendant had knowledge or notice of a certain fact. At other times it is sufficient to aver that the defendant did some act, without inquiring into the state of his mind at the time. In some cases the defendant's intention is material; in a few cases his motive. The legal relation in which the parties stand to one another should generally be stated.

Thus the law requires that notice of dishonour be given to every person who is sought to be made liable on a negotiable instrument, except the acceptor. Unless such notice was duly given or was waived or excused, no action lies against the drawer or any indorser. Hence the statement of claim, whether indorsed on the writ or not, must contain either an allegation that notice of dishonour was given to the defendant, or a statement of the facts relied on as excusing the giving of such notice.[3] Again, at common law no action could be brought by the assignee of a chose in action in his own name against the debtor. Such an action is now permitted in certain cases by section 25 (6) of the Judicature Act, 1873. Hence the statement of claim must contain express averments of all facts necessary

[1] Order XIX., r. 25.
[2] *Philipps* v. *Philipps* (1878), 4 Q. B. D. at p. 139.
[3] *Frühauf* v. *Grosvenor & Co.* (1892), 61 L. J. Q. B. 717.

to bring the case within that section. It must allege an absolute assignment in writing of the chose in action, and notice in writing to the defendant of such assignment; otherwise the plaintiff would have no title to sue.[1]

But the pleader need only allege facts which are material at the present stage of the action. It is sufficient that each pleading in turn should contain in itself a good *primâ facie* case, without reference to possible objection not yet urged. "Neither party need in any pleading allege any matter of fact as to which the burden of proof lies upon the other side."[2] "It is no part of the statement of claim to anticipate the defence, and to state what the plaintiff would have to say in answer to it."[3] So, too, it is quite unnecessary for the defendant to defend himself against charges which are not yet made, or to plead to causes of action which do not appear in the statement of claim.

"Pleadings are now to be merely concise statements of the facts which the party pleading deems material to his case;"[4] the inferences of law to be drawn from those facts should not be pleaded. If it is necessary or expedient to lay down any proposition of law in a pleading, the facts on which that proposition is based must also be set out.

Thus a plaintiff should not merely aver, "I am entitled to certain property," or, "It was the duty of the defendant to do so and so;" he must state in his pleading the facts, which in his opinion give him that title or which impose on the defendant that liability or duty. Again, a plaintiff should not simply allege, "I am the heir-at-law of A. B. deceased;" he must state the facts and show how he is related to the deceased.[5] So, too, a defendant must not say merely, "I do not owe the money;" he must allege facts which will show that he does not owe it, *e.g.*, that he never ordered the goods or has never received them.

Whenever the same legal result can be attained in several different ways, it is not sufficient to aver merely that the result has been arrived at; the facts must be stated showing how and by what means it was attained. Thus, a contract may be rescinded in many ways; hence, if a defendant

[1] *Seear* v. *Lawson* (1880), 16 Ch. D. 121; *Bradley* v. *Chamberlyn*, [1893] 1 Q. B. pp. 441, 442; *Hughes* v. *Pump House Hotel Co.* (No. 1), [1902] 2 K. B. 190.

[2] Order XIX., r. 25.

[3] *Per* James, L. J., in *Hall* v. *Ere* (1876), 4 Ch. D. at p. 345.

[4] *Per* Brett, J., in *Lord Hanmer* v. *Flight* (1876), 24 W. R. at p. 347.

[5] *Dumsday* v. *Hughes* (1803), 3 Bos. & Pul. 453; *Palmer* v. *Palmer*, [1892] 1 Q. B. 319.

alleges that the contract upon which the plaintiff relies has been rescinded, he must state in what manner and by what means he contends that it was rescinded. Again, it is not sufficient for either party to allege that a bill of sale is void; facts must be set out showing why it is void, *e.g.*, that it has not been registered or is not in the form given in the schedule to the Bills of Sale Act, 1878.[1]

Either party may in a proper case include in his pleading two or more inconsistent sets of material facts, and claim relief thereunder in the alternative. A plaintiff may rely on several different rights alternatively, although they may be inconsistent. So a defendant "may raise by his statement of defence without leave as many distinct and separate, and therefore inconsistent, defences, as he may think proper."[2] A pleading is not embarrassing merely because it contains inconsistent averments.[3] But whenever such alternative cases are alleged, the facts belonging to them respectively ought not to be mixed up, but should be stated separately, so as to show on what facts each alternative relief is claimed. Thus a commission agent may, with proper averments, claim against his principal—

(a) commission earned under a special contract duly performed;

(b) damages for not being allowed to perform the special contract and earn that commission; and

(c) on a *quantum meruit*.

Again, every pleading must contain only a statement of the material facts, on which the party pleading relies, and not the evidence by which they are to be proved. It is not always easy to decide what are the facts to be proved, and what is only evidence of those facts; but in most cases a line can be clearly drawn between a material fact and the evidence by which that fact will be proved at the trial. The fact in issue between the parties is the *factum probandum*, the fact to be proved, and therefore the fact to be pleaded. It is unnecessary to tell the other side how it is proposed to prove that fact;

[1] 41 & 42 Vict. c. 31; and see *Harris* v. *Jenkins* (1882), 22 Ch. D. 481, *post*, p. 1208.
[2] *Per* Thesiger, L. J., in *Berdan* v. *Greenwood* (1878), 3 Ex. D. at p. 255.
[3] *Child* v. *Stenning* (1877), 5 Ch. D. 695.

such matters are merely evidence, *facta probantia*, facts which merely tend to establish the fact in issue. Such facts will be relevant at the trial, but they are not "material facts" for pleading purposes and should not therefore be set out. "It is an elementary rule in pleading, that, when a state of facts is relied on, it is enough to allege it simply, without setting out the subordinate facts which are the means of proving it."[1]

A few instances will make this distinction clear.

Suppose that the defendant, who is now sued for the price of goods sold and delivered to him, has in a letter admitted that he received the goods; this admission is only a piece of evidence and should not be mentioned in the pleadings. The plaintiff should merely allege in his statement of claim that the goods were delivered to the defendant, and produce the letter at the trial in proof of this allegation. So whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it is sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations, or circumstances without setting them out in detail.[2] And where it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it is sufficient to allege the same as a fact without setting out the circumstances from which it is to be inferred.[3] Wherever it is material to allege notice of any fact, it is sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, be material.[4]

Material facts must be stated in what the rule calls "a summary form," *i.e.*, briefly and succinctly, and in strict chronological order. All immaterial matter should be rigidly excluded. Neither party, for instance, should cite public Acts of Parliament, or plead to any matter of law set out in his opponent's pleading. Neither party should allege any matter of fact the burden of proving which lies on his opponent.[5] It is sufficient to state the substance of any material conversation; the precise words uttered need not be given. Neither party need set out the whole or any part of any document, unless its precise words are material; it is

[1] *Per* Lord Denman, C. J., in *Williams* v. *Wilcox* (1838), 8 A. & E. at p. 331.
[2] Order XIX., r. 24.
[3] Order XIX., r. 22.
[4] Order XIX., r. 23.
[5] Order XIX., r. 25.

sufficient to state briefly its effect.[1] It is not necessary for any defendant to plead any denial or defence as to damages claimed or their amount,[2] or for either party to plead any matter or to any matter, which merely affects costs.

At the same time, every pleading must be precise as well as concise. Dates are, as a rule, of great importance. Sometimes it is necessary to give particulars as to place and surrounding circumstances; but all unnecessary details should be avoided. Neither party need disclose his evidence; but he must define his case. If necessary details be not stated in a pleading, the opponent may apply for particulars; and the Master will make an order that particulars be given whenever the pleading delivered does not give the opponent the information necessary to enable him to prepare for trial.

Thus, in an action for the price of goods delivered at different times, the date, quantity and price of each separate consignment should be stated. In an action on any negotiable instrument full particulars of the amount and date and of the parties to it should be set out.[3] So, too, whenever either party claims a right of way, he must define the course of the road or path, showing where he alleges his right to commence and to end; he must also state whether he claims a right to a footpath, bridle-path, or carriage-road, and whether such right vested in him by grant or prescription; but he need not name the parties or give the precise dates of lost grants.[4]

### *Statement of Claim.*

The statement of claim must show a right of action in every plaintiff named on the writ and a liability on the part of each defendant jointly, severally or in the alternative. Yet it need not propound any conclusions of law or contain any technical phrases. It should merely state briefly and in chronological order the material facts on which the plaintiff relies, and then claim the relief to which he deems himself entitled on those facts. The Court will declare the law arising upon the facts so pleaded, and determine the rights of the parties thereby. All necessary particulars must now be

[1] Order XIX., r. 21. See *Harris* v. *Warre* (1879), 4 C. P. D. 125.
[2] Order XXI., r. 4.
[3] *Walker* v. *Hicks* (1877), 3 Q. B. D. 8.
[4] *Harris* v. *Jenkins* (1882), 22 Ch. D. 481; *Palmer* v. *Guadagni*, [1906] 2 Ch. 494.

set out in the body of the pleading, unless they exceed three folios.[1]

The statement of claim must be divided into paragraphs, numbered consecutively. It may be necessary in some cases for the pleader to begin with certain introductory averments stating who the parties are, what trade they carry on, how they are connected, and any other circumstances leading up to the dispute, and explaining what is to follow. Then, if the action be brought on a contract, it should clearly appear on the pleading whether the contract is express or implied; if express, its date should be stated, and whether it was written or verbal;[2] if implied, the facts should be set out from which the plaintiff contends a contract should be implied.[3] If the contract be by deed, this fact should be stated; in other cases, a consideration must be shown.

In actions of tort, if the plaintiff's right which has been violated is one which every citizen possesses (*e.g.*, a right to have his reputation or person unassailed), it need not be expressly pleaded. But a private right of property (*e.g.*, a copyright, a patent right, an easement, or a *profit à prendre*) must be stated in full detail;[4] and the plaintiff must also show how such right was acquired. It is not sufficient to allege that a right, or a duty, or a liability exists; the facts must be set out which gave rise to such right or created such duty or liability. Then the acts of the defendant which, according to the plaintiff, violated that right or amounted to an actionable neglect of that duty, must be stated with precision.

Next should follow in either case the allegations as to damage. Full detail must be given of any special damage claimed, otherwise all evidence of such matters ought in strictness to be excluded; matter in aggravation of damages may be set out in the statement of claim, if the plaintiff desires.[5] The plaintiff can claim for any damage that has accrued

[1] Order XIX., r. 6.
[2] *Turquand* v. *Fearon* (1879), 48 L. J. Q. B. 703.
[3] See Order XXI., r. 3, which is set out, *post*, pp. 1214, 1215.
[4] *Davis* v. *James* (1884), 26 Ch. D. 778; *Spedding* v. *Fitzpatrick* (1888), 38 Ch. D. 410.
[5] *Millington* v. *Loring* (1880), 6 Q. B. D. 190.

to him since writ, down to the time of assessing damages, from a cause of action vested in him before writ; though where special damage is an essential part of the cause of action, some such damage before writ must be shown.[1] But a plaintiff cannot claim damages in respect of any cause of action which has only accrued to him since writ. For such damages he must issue a second writ; and he can then apply, if he thinks fit, to have the two actions consolidated.[2]

Then comes the claim for relief. The plaintiff should always claim in the one action every kind of relief to which he is entitled—be it damages or an injunction, a declaration, a *mandamus* or a receiver.[3] He will not be allowed to bring a second action on the same cause of action in order to obtain relief which he might have obtained in the first action.[4]

After the defendant has entered an appearance to a writ generally indorsed, the plaintiff must, as we have seen,[5] obtain an order from the Master before delivering a statement of claim. Strictly he may not, without express leave, include in his pleading a new and independent cause of action, which is not mentioned on his writ; although he may by his statement of claim and without any amendment of the indorsement on the writ "alter, modify or extend" any claim, which is included in the writ, by claiming further relief.[6] On the other hand, if a plaintiff in his statement of claim omits all mention of a cause of action or a claim for relief which is stated on his writ, he will be deemed to have elected to abandon it.[7] Whenever the plaintiff has more than one cause of action, he must in his pleading, so far as is possible, state separately and distinctly the facts upon which each claim is founded.[8]

The statement of claim, moreover, should correspond with the writ in the names of the parties, in the number of the parties, and in the characters in which they sue and are sued. If any party sues, or is sued, in a representative character (*e.g.*, as trustee in bankruptcy or as executor of a will), this fact must be stated in the heading of the statement of claim, as well as on the writ. If the plaintiff desires to add a fresh plaintiff or defendant, an application must be made under Order XVI., rr. 11 and 12; and strictly the writ should be amended too.[9]

[1] Order XXXVI., r. 58.
[2] *Martin* v. *Martin*, [1897] 1 Q. B. 429; but see *Lee* v. *Arthur* (1908), 100 L. T. 61.
[3] See *ante*, pp. 1141—1154.
[4] *Serrao* v. *Noel* (1885), 15 Q. B. D. 549.
[5] *Ante*, p. 1185.
[6] Order III., r. 2; Order XX., r. 4.
[7] *Cargill* v. *Bower* (1878), 10 Ch. D. 502; *Lewis and Lewis* v. *Durnford* (1907), 24 Times L. R. 64.
[8] Order XX., r. 7.
[9] As to amending a statement of claim after it has been delivered, see Order XXVIII., rr. 2, 4—10.

We subjoin three precedents of statements of claim. The first of these might have been indorsed on the writ; the other two could not, as the causes of action are not within Order III., r. 6.

*No.* 4.

*Goods Sold and Delivered to a Married Woman.*

1910. J. No. 30.

*In the High Court of Justice,*
King's Bench Division.

*Writ issued* 11*th March*, 1910.

BETWEEN JOLIFFE & Co. . . . . *Plaintiff*,

AND

FREDERICK BROWN . . . . . *Defendant.*

STATEMENT OF CLAIM.

1. The Plaintiffs are Drapers and Dressmakers, carrying on business at 212, High Street, Kensington.

2. During the years 1907 and 1908, Mrs. Brown, late wife of the Defendant, ordered of the Plaintiffs and the Plaintiffs delivered to her at 23, Langham Gardens, W., where she was then living with the Defendant, goods to the value of £134 10*s.* 0*d.*; such goods were necessary articles of attire suitable to the estate and degree of the Defendant's late wife.

3. Particulars of the said goods have been delivered and exceed three folios. Accounts showing such particulars were rendered half-yearly to the said Mrs. Brown at the said address and since her death to the Defendant, to wit at Midsummer and Christmas in each of the years 1907, 1908 and 1909.

4. Yet the Defendant has not paid the said sum of £134 10*s.* 0*d.*, or any part thereof.

And the Plaintiffs claim £134 10*s.* 0*d.*

HUGH WILLIAMS.

Delivered the 1st day of April, 1910, by, &c.

*No.* 5.

*Action for Breach of Promise of Marriage.*

STATEMENT OF CLAIM.

1. On March 15th, 1909, the Plaintiff and the Defendant verbally agreed to marry each other.

2. The Plaintiff was always ready and willing to marry the Defendant; but the Defendant has neglected and refused to marry the Plaintiff, and on January 24th, 1910, he married another lady.

And the Plaintiff claims £500 damages.

CHRISTOPHER JOHNSTONE.

No. 6.

*Action of Slander.*

STATEMENT OF CLAIM.

1. The Plaintiff is a road contractor carrying on business at Walsham in the county of Norfolk.

2. In the months of March, April and May, 1907, the Plaintiff was employed by the Walsham Urban District Council under a contract under seal dated March 4th, 1907, to make up certain roads within the district the names of which are set out in the schedule to the said contract.

3. On July 12th, 1907, the defendant falsely and maliciously spoke and published of the plaintiff and of him in the way of his said business the following words :—

"That the work is scandalously badly done. Wilkins has broken his contract in

many important particulars; and he ought not to be paid a penny more of the rate-payers' money until his work is thoroughly examined."

4. The said words were spoken to A. B., C. D., E. F., and others whose names are at present unknown to the plaintiff.

5. The defendant meant and was understood to mean thereby that the plaintiff was a dishonest and fraudulent person who claimed money from the said District Council to which he was not entitled, and that the plaintiff was incompetent and not fit to be trusted or employed to carry out any public work.[1]

6. In consequence of the said words the plaintiff was injured in his credit and reputation and in his said business [and the Horsey Rural District Council, who had formerly employed the plaintiff as its road contractor, ceased to do so].[2]

The Plaintiff claims damages.

JOHN DOE.

## *Defence.*

A defendant, to whom a statement of claim has been delivered, has several courses open to him. If he has no case and the damages claimed are unliquidated, it is sometimes the best plan to put in no defence at all, and to let judgment go by default. The damages will then be assessed by a sheriff's jury, who do not, as a rule, take an extravagant view of the case, and less publicity attends the hearing. But in other cases it is better for a defendant who has no defence to pay money into Court as amends. This he can do at any stage of the action, and the earlier the better. If he does so, he must state the fact in his defence.[3]

If, however, the defendant really means to fight the action, he (or counsel on his behalf) should carefully consider the statement of claim, and the way in which the action is shaped against him. Many technical points may at once arise. Is any cause of action shown? Is the only cause of action shown frivolous and vexatious? If so, he may apply to strike out the statement of claim. Such an application should be made before any defence is delivered. Should the action be remitted to the county court under either section 65 or section 66 of the County Courts Act, 1888?[4] Then, is the claim properly pleaded? Is any portion of it embarrassing?[5] Or are particulars necessary? Have claims been joined which

[1] This is the innuendo: see *ante*, pp. 515, 516.

[2] The words in brackets are an allegation of special damage as distinct from the allegation of general damage, which precedes them.

[3] See *post*, p. 1219.

[4] 51 & 52 Vict. c. 43.

[5] If so, it may be struck out under Order XIX., r. 27.

cannot conveniently be disposed of in one action? If so, the defendant should apply to sever them under Order XVIII., rr. 1, 7, 8, or 9.

If no such points arise, or as soon as any that do arise have been disposed of, the defendant must proceed to draft his defence. He will probably find that there are some allegations in the statement of claim which he cannot seriously dispute, and others which he stoutly contests. In this case it is open to him—and indeed it is his duty—to admit the former and deny the latter in his defence, provided that he makes it perfectly clear how much he admits and how much he denies. Again, it may be that he has some justification or other answer to the facts which he admits; such justification or other answer must be specially pleaded. Or the defendant may rely for his defence on an objection in point of law; he may urge that, even admitting for the sake of argument that all that the plaintiff has alleged is correct, nevertheless he has disclosed no cause of action. Lastly, the defendant, whether he admits or contests the plaintiff's claim, may set up a cross-claim of his own—a set-off or a counter-claim—in respect of which he will be virtually a plaintiff.[1]

And speaking generally, all these different defences may be raised concurrently, even though they may appear somewhat inconsistent. The same allegation may be denied in point of fact, objected to as bad in law, and at the same time collateral matter may be pleaded to destroy its effect. A defendant may justify or excuse the act complained of, whether he admits or denies that he did it. All these various defences must be clearly and distinctly pleaded, and the facts upon which each is grounded should be stated separately. As a rule each answer to the action should be placed in a separate paragraph.

The defendant, like the plaintiff, must set out in his pleading every material fact, on which he proposes to rely at the trial. But he differs from the plaintiff in this—he must not only set up a case of his own, he must also answer the

[1] See *post*, pp. 1220, 1221.

case of his opponent. He must deal specifically with every fact alleged in the statement of claim, which he does not admit to be true. He must frankly admit or clearly deny every material allegation made against him; he should not deny everything—to do so will only cause useless expense. He should admit all he safely can. But he must not forget that it is open to the plaintiff at any stage of the action,[1] if sufficient admissions be made, to apply for judgment under Order XXXII., r. 6. A party who has unwarily made an admission will, however, in a proper case be allowed to recall it.

The contradiction in terms of an allegation in the preceding pleading is technically known as a "traverse." If the defendant decides to traverse any paragraph of the statement of claim, he must deal specifically with every material fact contained in that paragraph. He need not plead to any matter of law; allegations of fact alone should be traversed, and these he must not traverse "evasively, but answer the point of substance." He will be taken to admit every allegation of fact, which he does not specifically or by necessary implication deny.[2] Any half-admission or half-denial will be regarded as evasive.

A defendant may no longer deny generally the facts alleged in the statement of claim. Special instances of the application of this general principle are given in the Rules of the Supreme Court:—

"In actions for a debt or liquidated demand in money, comprised in Order III., r. 6, a mere denial of the debt shall be inadmissible."

"In actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact, *e.g.*, the drawing, making, endorsing, accepting, presenting, or notice of dishonour of the bill or note."

"In actions comprised in Order III., r. 6, classes A and B,[3] a defence in denial must deny such matters of fact, from which the liability of the defendant is alleged to arise, as are disputed."

"In actions for goods bargained and sold, or sold and delivered, the defence must deny the order or contract, the delivery, or the amount claimed; in an action for money had and received, it must deny the receipt

[1] He may do so even after he has given notice of trial: *Brown* v. *Pearson* (1882), 21 Ch. D. 716.

[2] Order XIX., rr. 13, 17, 19; but see Order XXI., rr. 4, 21.

[3] See *ante*, p. 1190.

of the money, or the existence of those facts which are alleged to make such receipt by the defendant a receipt to the use of the plaintiff." [1]

"If an allegation is made with divers circumstances, it shall not be sufficient to deny it along with those circumstances." [2]

Sometimes in order to obey these rules and to deal specifically with every allegation of fact of which he does not admit the truth, it is necessary for the defendant to place on the record two or more distinct traverses to one and the same allegation. Thus, if he pleads "The defendant never broke or entered the plaintiff's close," he thereby admits that the close in question belongs to the plaintiff. If he intends at the trial to deny that the plaintiff owned or possessed that close, he must say so distinctly and in a separate plea. If he wishes to raise both defences, he must put on the record two separate paragraphs, *e.g.*—

1. "The defendant never broke or entered the said close."

2. "The said close is not the close of the plaintiff."

Again, a traverse may become evasive if it follows too closely the precise language of the allegation traversed. Thus in *Tildesley* v. *Harper*,[3] the statement of claim alleged that the defendant offered the plaintiff a bribe of £500. The defendant pleaded, following the exact words of the statement of claim, that "the defendant had never offered the plaintiff a bribe of £500;" which would have been true if he had offered £499, or any lesser sum. Fry, J., held that the point of substance was that a bribe had been offered, and that this was not fairly or substantially denied. The defendant should have pleaded that he never offered "a bribe of £500 or any other sum." Leave to amend was eventually given.

Merely to deny an allegation in terms will often be ambiguous, and therefore evasive. If an allegation be made with details of time and place, &c., the defendant must deny the substance of the allegation, and not confine himself to denying it along with the inessential details which the rule terms "circumstances."

Thus, if a statement of claim alleges that "the defendant assaulted and beat the plaintiff at 35, Fleet Street, on March 3rd, 1908, in the presence of A. B.," it would be evasive for the defendant to plead that "the defendant did not assault or beat the plaintiff at 35, Fleet Street, on March 3rd, 1908, in the presence of A. B." For he might have assaulted him on another day or in another place, or when A. B. was not present. And these details are only "circumstances;" they are not of the essence of the allegation; they obscure the "point of substance." The right traverse is simply: "The defendant never assaulted or beat the plaintiff."

In many cases, however, it is not sufficient for a party to deny an allegation in his opponent's pleading; he must go further and dispute its validity in law, or set up some affirmative

[1] Order XXI., rr. 1, 2, 3.
[2] Order XIX., r. 19.
[3] (1877), 7 Ch. D. 403; (1878), 10 Ch. D. 393.

case of his own in answer to it. It will not serve his turn merely to traverse the allegation. The office of a traverse is to contradict, not to excuse or justify the act complained of; its object is to compel the plaintiff to prove the truth of the allegation traversed, not to dispute its sufficiency in point of law. So all matters that go to show that the contract sued upon is illegal or invalid, or which, if not expressly stated, would be likely to take the opposite party by surprise at the trial, or would raise issues of fact not arising out of the preceding pleading, must be specially and separately pleaded[1]—"as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality either by statute or common law, or Statute of Frauds."[2] No evidence of such matters can, as a rule, be given at the trial if they be not expressly pleaded.[3]

Special defences of this kind must not be insinuated into pleas which deny the facts alleged by the plaintiff. Any plea, which wears a doubtful aspect and might be either the denial of a fact or a justification of it, may be struck out as embarrassing. Yet the defendant, as we have seen, may set up both these defences in the same pleading, if he makes it quite clear that he desires to raise two distinct and separate issues.

Thus, if the plaintiff sets up a contract which was in fact made, it will be idle for the defendant merely to traverse the making of the contract; he should confess that he made the contract, but avoid the effect of that confession by pleading the Statute of Frauds or the Statute of Limitations, or setting up that the contract had been duly performed or rescinded.

If the defendant pleads merely that he never agreed as alleged, this will be taken to mean that he never in fact made any such agreement; and he will not be allowed at the trial to contend that the agreement set up by the plaintiff is bad in law, or not binding on him because he is an infant, or because he was induced to enter into it by fraud. All facts tending to show the insufficiency or illegality of any contract must be specially pleaded.

So in an action of tort. If the plaintiff alleges that the defendant

[1] Such a plea is called a plea in confession and avoidance, because it confesses that the act was done, but seeks to avoid liability in respect of it by stating fresh facts.

[2] Order XIX., r. 15.

[3] An exception is made in favour of the defendant in an action for the recovery of land: see *post*, p. 1256.

wrongfully entered on his premises, the defendant must not plead that "he never wrongfully entered on the plaintiff's premises;" for this mode of pleading does not make it clear whether the defendant means to deny the fact of entry, or whether he means to assert that he had a right to enter. If the former be his meaning, he should merely traverse, thus: "the defendant never entered on the said premises." If he means to justify his entry, he must plead in confession and avoidance, setting out the facts on which he relies as giving him the right to enter, *e.g.*, an express grant of a right of way.

Lastly, if the defendant desires to contend that, even assuming every word in the statement of claim to be correct, it discloses no cause of action, he can place on the record an objection in point of law. He is not bound to do this; he can raise the point of law at the hearing without doing so; but, unless he does so, there is no possibility of his being allowed to argue the point of law before the hearing and so save the expense of a trial. Moreover, his doing so will not entitle him to have the point of law argued before the hearing. An objection in point of law, even though expressly pleaded, is generally argued at the trial of the action; it is only by consent of the parties, or by order of a Master, that the party objecting can have the point set down for argument and disposed of before the trial.[1] And, as a rule, such an order will only be made where the decision of the point of law will practically render any trial of the action unnecessary; in such cases, therefore, the defendant should certainly set out his objection in his defence.[2]

The distinction between these three methods of pleading to a statement of claim will be clearly seen from the following precedents:—

No. 7.

*Defence to Precedent No.* 3.[3]

1. The defendant never agreed as alleged.

2. There is no memorandum in writing of the alleged agreement sufficient to satisfy the Statute of Frauds.

3. The plaintiff discharged the defendant from all liability in respect of the said goods by giving time to the principal debtor, the said Silvanus Smith.

[N.B.—The first paragraph traverses; the other two confess and avoid.]

[1] Order XXV., r. 2; and see *Hellwig* v. *Mitchell*, [1910] 1 K. B. 609.

[2] The same considerations apply to an objection in point of law taken by the plaintiff in his reply.

[3] *Ante*, p. 1193. Defences have the same formal heading and ending as statements of claim: see *ante*, p. 1211.

No. 8.

*Defence to Precedent No* 4.[1]

DEFENCE.

1. The defendant does not admit that his late wife ever ordered of the plaintiffs any of the goods mentioned in the statement of claim, or that the plaintiffs ever delivered any of the said goods at his residence at 23, Langham Gardens, W., or at all.

2. None of the said goods were necessaries as alleged in paragraph 2 of the statement of claim.

3. The defendant regularly paid to his wife an allowance in money sufficient to enable her to purchase all necessary articles of attire, and expressly forbade her to pledge his credit for any such articles, as the plaintiffs well knew.

4. In the alternative the defendant says that the prices charged by the plaintiffs for the said goods are unreasonable and exorbitant. He brings into Court the sum of £100, and says that the same is sufficient to satisfy the plaintiff's claim in this action.

FREDERICK JACKSON.

No. 9.

*Defence to Precedent No.* 6.[2]

DEFENCE.

1. The defendant never spoke or published any of the words set out in paragraph 3 of the statement of claim.

2. The defendant did not mean and was not understood to mean what is alleged in paragraph 5 of the statement of claim. The said words are incapable of any of the alleged meanings or of any other defamatory or actionable meaning.

3. The said words without the said alleged meanings are true in substance and in fact. The work was scandalously badly done. The plaintiff had broken his contract in many important particulars.

PARTICULARS.

(a) ARLINGTON ROAD.

No concrete under channelling.

No hard core under the road opposite Nos. 13 to 24 inclusive.

(b) MANVERS ROAD.

No [*&c.*]

4. The defendant is a member of the Walsham Urban District Council. At the meeting of the said district council held on July 12th, 1907, the chairman of the highways committee moved that the plaintiff be paid the balance of the moneys claimed by him under his contract with the said district council. The defendant made a speech in opposition to this motion. If in the course of such speech the defendant spoke any of the words set out in paragraph 3 of the statement of claim, he did so in the *bonâ fide* discharge of his duty as a district councillor and without any malice towards the plaintiff and in the honest belief that what he said was true; and the said words were published only to the members of the said district council who had a corresponding interest and duty in the matter. The occasion is therefore privileged.

5. The said words are a fair and *bonâ fide* comment on matters of public interest in the said district, viz., the condition of the roads in the said district and the claim of the plaintiff to be paid by the said district council for making the said roads.

6. The defendant will object that the said words are not actionable without proof

[1] *Ante*, p. 1211.
[2] *Ante*, p. 1211.

of special damage and that the special damage alleged in paragraph 6 of the statement of claim is too remote and not sufficient in law to sustain the action.

RICHARD ROE.

[N.B.—Paragraph 1 traverses the publication. The first part of paragraph 2 traverses the innuendo; the second part of this paragraph, like paragraph 6, is an objection in point of law. The other paragraphs, 3, 4, and 5, which raise the defences of justification, privilege, and fair comment, are pleas in confession and avoidance.]

### *Payment into Court.*

The defendant in any action may, if he wishes, pay money into Court at any stage of the proceedings. Such a payment is not a defence; it is rather an attempt at a compromise. If it be made before defence, the defendant must deliver to the plaintiff a notice in the form prescribed by the Rules of Court (No. 3, Appendix B). It must always be signified in the defence, whether such a notice has been delivered or not. If the statement of claim contains more than one cause of action, the defence must specify to which cause of action the money is paid in.[1]

Unless the defendant, on paying money into Court, expressly denies liability, such payment is considered to admit the plaintiff's claim to the extent of the amount paid in; and the defendant cannot subsequently deliver any defence denying such liability.[2] But in all actions, except actions of libel and slander, the defendant may, if he thinks fit, deny all liability, when he pays money into Court, and this express denial will prevent the payment into Court operating as an admission. If the money be paid into Court without a denial of liability, the plaintiff can, unless the Master otherwise order, either take the money out of Court in satisfaction of his claim and so put an

[1] Order XXII., r. 2; *The James Tucker, &c., Co.* v. *Lamport and Holt* (1906), 23 Times L. R. 10. But the mere omission to specify such claim or cause of action will not render the payment into Court nugatory: *Benning* v. *Ilford Gas Co.*, [1907] 2 K. B. 290. Where there is only one cause of action, but it consists of many items, the defendant is, nevertheless, entitled to pay money in o Court generally to that cause of action. He will not, as a rule, be ordered to deliver particulars, specifying how much he has paid in to each item, or even in respect of which items the payment is made: *Paraire* v. *Loibl* (1880), 49 L. J. C. P. 481. But the Court has a discretion in the matter, and in special circumstances will order such particulars: *Boulton* v. *Houlder* (1903), 19 Times L. R. 635.

[2] Order XXII., r. 1; *Kingham* v. *Robins* (1839), 5 M. & W. 94; *Hennell* v. *Davies*, [1893] 1 Q. B. 367; *Dumbelton* v. *Williams* (1897), 76 L. T. 81.

end to the action,[1] or he may take it out of Court not in satisfaction and continue the action in the hope that the jury will award him a larger amount.[2] But if the money be paid into Court with a denial of liability, the plaintiff can only take it out in satisfaction of his claim. If he is not willing to do this, the money remains in Court to abide further order. If the plaintiff continues his action, he will be entitled to the whole of his costs of the action if the amount of the verdict be larger than the sum paid into Court. But if the jury find a verdict for an amount not greater than the sum paid into Court, the plaintiff will, as a rule, have his costs of the action only up to the time when the money was paid into Court, and the defendant will have all costs incurred after that time. Hence, if the defendant pays money into Court at all, he will be wise to pay in a good round sum. The jury will find their verdict without reference to the amount paid in; indeed, neither the fact that money has been paid into Court, nor the amount paid in, may be mentioned to them.[3]

*Set-off and Counterclaim.*

The defendant may also defeat the plaintiff's claim wholly or partially by setting up a cross-claim. The Judicature Act of 1873 gave every defendant a very wide power of counterclaiming. He may, by virtue of section 24 (3) of that Act, claim in the plaintiff's action any estate, right or title in himself, legal or equitable, and obtain the same relief as if he had brought a separate action against the plaintiff for the purpose. The counterclaim need not be in any way connected with the plaintiff's claim, or arise out of the same transaction. It need not be "an action of the same nature as the original action" or even analogous to it. "A claim founded on tort may be opposed to one founded on contract, or *vice versâ*." It may even have arisen since the date of the writ.

[1] The acceptance by the plaintiff of a sum paid into Court does not operate as a judgment or amount to an admission on the merits, except as to damages: *Coote* v. *Ford*, [1899] 2 Ch. 93: cf. *Young* v. *Black Sluice Commissioners* (1909), 73 J. P. 265.

[2] In Admiralty actions, however, money can never be taken out of Court without the order of a Master: Order XXII., r. 20.

[3] Order XXII., r. 22.

A counterclaim is governed by the same rules of pleading as a statement of claim. The defendant must set out the facts, upon which he relies in support of his counterclaim, separately from those which constitute his defence. And he must state specifically that he relies on the former "by way of counterclaim."[1] A counterclaim must, of course, show a valid cause of action; otherwise it may be struck out under Order XXV., r. 4. Moreover, it may be excluded if it be of such a nature that it cannot conveniently be tried by the same tribunal or at the same time as the plaintiff's claim. Otherwise the claim and counterclaim will be tried together in one proceeding. If the amount which is found to be due to the plaintiff on his claim exceeds the amount established by the defendant on his counterclaim, the plaintiff will have judgment for the difference; if, however, the balance is in favour of the defendant, judgment will be given for the defendant for such balance, or for any other relief to which he may be entitled.

At common law a defendant who had any claim against the plaintiff could not raise it in the plaintiff's action: he had to bring a cross-action. He might, it was true, when sued for the price of goods, give evidence of a breach of any warranty, express or implied, in reduction of the price; but that was all. Then in the reign of George II. he was allowed to plead a set-off in certain cases.[2] A set-off was a cross-claim for a liquidated amount of money, and could only be pleaded to a liquidated money claim. Both the set-off and the claim to which it was pleaded had to be mutual debts, both due from and to the same parties in the same right. And if the debt due from the plaintiff to the defendant exceeded the amount due from the defendant to the plaintiff, the defendant could not before 1875 recover the difference in the plaintiff's action; he could only set off an amount equal to the plaintiff's claim, and he had to bring a cross-action for the balance.

The defendant's right of set-off is not affected by the Judicature Act; a set-off is still for some purposes distinct from a counterclaim. Every set-off, it is true, might be pleaded as a counterclaim; but not every counterclaim as a set-off. A set-off remains what it was—a statutory defence to the plaintiff's claim or to a portion of it. But a counterclaim is practically a cross-action, although there is only one judgment on claim and counterclaim together.

### *Default of Defence.*

If no defence be delivered in answer to a statement of claim, the plaintiff may enter final judgment if his claim be

[1] Order XXI., r. 10.
[2] 2 Geo. II. c. 22; 8 Geo. II. c. 24.

for a debt or liquidated damages; if it be for unliquidated damages or for detention of goods, he can enter interlocutory judgment only, and the amount for which final judgment will ultimately be entered must be assessed by an under-sheriff and a jury on a writ of inquiry, or calculated by a Master, or ascertained by an official referee.[1] In an action for the recovery of land, he may sign judgment for possession of the land with costs. In all other cases he must move for judgment under Order XXVII., r. 11. On such a motion, the Court will decide the rights of the parties by looking at the statement of claim, which now stands admitted. No evidence is necessary unless the defendant be an infant or a lunatic, and therefore incapable of making admissions.

*Reply, etc.*

But if a defence has been delivered, the plaintiff (or counsel on his behalf) must consider if it is properly drawn. Does it disclose any real defence to the action? Is such defence properly pleaded? If not, the plea may be struck out as embarrassing. Does it contain sufficient details to enable the plaintiff to prepare for trial? If not, he should apply for particulars. Has the defendant paid a sum of money into Court? If so, is the plaintiff content to accept that sum in satisfaction of his claim? In that case he should deliver no reply, but give the defendant a notice that he accepts the sum paid into Court, and proceed to tax his costs.

Next comes the question, is it necessary to deliver any reply? If the plaintiff merely wishes to deny what the defendant has stated in his defence, no reply need be delivered; for all material statements of fact in the defence will "be deemed to have been denied and put in issue"[2] without any further pleading. But if the plaintiff desires to do more than merely traverse the allegations contained in the defence, if he wishes to set up any substantive reply, which will introduce new facts and therefore involves a special plea, he must

[1] See Order XXVII.
[2] Order XXVII., r. 13.

deliver a reply. And for this purpose he must first obtain an order from the Master; for, except in Admiralty actions, no reply can be delivered without leave.[1]

A special reply usually commences with the statement, "The plaintiff joins issue with the defendant on his defence." This is called a "joinder of issue;" it is a compendious form of traverse, only permitted in pleadings subsequent to defence. It operates "as a denial of every material allegation of fact in the pleading upon which issue is joined;"[2] its effect, in short, is precisely the same as that produced by not delivering any reply. But it only contradicts. Hence the plaintiff must be careful not to join issue merely, where he ought to allege new facts or to raise an objection in point of law. He "must raise by his pleading all matters which show that the transaction is either void or voidable in point of law, and all such grounds of reply as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law or Statute of Frauds."[3]

Thus to a plea of the Statute of Limitations the plaintiff must specially reply any fact upon which he relies to take the case out of the statute, such as the infancy of the plaintiff, or the absence of the defendant beyond seas, or any acknowledgment. Another instance will be found in an old case decided as long ago as 5 Hen. VII. There the plaintiff had been granted a lease of a farm by the defendant's father. The defendant on his father's death entered upon the farm, and the plaintiff sued him for trespass. The defendant pleaded that the farm was his freehold. On this plea the plaintiff merely joined issue; and therefore at the trial he was not allowed to prove his lease. For by joining issue he had merely denied that which he now admitted, viz., that the defendant owned the freehold, and had nowhere set up a leasehold interest in himself.

But the plaintiff cannot start a new claim in his reply different in its nature from that put forward in the statement of claim. Thus, if the statement of claim alleged merely negligence, the plaintiff cannot in his reply assert that the defendant was guilty of fraud.[4] In such a case the

[1] Order XXIII., r. 1.
[2] Order XIX., r. 18.
[3] Order XIX., r. 15.
[4] Order XIX., r. 16. Such a change of front was called "a departure in pleading."

plaintiff must amend his writ and statement of claim by adding the new matter—if need be, in the alternative. So in an action of ejectment where the plaintiff by his statement of claim has treated the defendant as a trespasser, he cannot in his reply turn round and claim rent from him as a tenant.

Again, where a counterclaim has been delivered with the defence, a further pleading is necessary, as the plaintiff must deal specifically with every allegation of fact in the counterclaim which he does not admit to be true;[1] and the Master will therefore give him leave to deliver a "reply and defence to counterclaim." This is a pleading which combines a reply proper to the defence with the plaintiff's answer to a counterclaim. It generally commences with a joinder of issue or a joinder of issue together with a special reply. Then follows what is really a defence, and is governed by the rules applicable to a defence. The plaintiff cannot join issue on a counterclaim; he must plead to it as though it were a statement of claim. He may pay money into Court in satisfaction of a counterclaim, subject to the like conditions as to costs and otherwise as upon payment into Court by a defendant.[2]

It may sometimes be necessary for the defendant to deliver a "rejoinder" in answer to the plaintiff's defence to counterclaim.

*Notice of Trial; Entry for Trial.*

"If the plaintiff does not deliver a reply, or any party does not deliver any subsequent pleading within the period allowed for that purpose, the pleadings shall be deemed to be closed at the expiration of that period, and all the material statements of fact in the pleading last delivered shall be deemed to have been denied and put in issue."[3] The next step is for the plaintiff to deliver a notice of trial, naming the place of trial, which has been already fixed by the Master, and stating the day which he proposes for the trial of the action. He must give at least ten days' notice of trial, unless

[1] Except damages: Order XIX., r. 17.
[2] Order XXII., r. 9.
[3] Order XXVII., r. 13.

the defendant has consented, or has been ordered, to accept short notice of trial, which is usually four days. The plaintiff may give notice of trial with his reply, if any, whether it closes the pleadings or not, or, if no leave has been given to deliver a reply, on the expiration of four days after the delivery of the defence.[1] If the plaintiff does not give notice of trial within six weeks after the close of the pleadings, the defendant may either give notice of trial himself, or apply to a Master to dismiss the action for want of prosecution.[2] Whichever party gives notice of trial must enter the action for trial on the books of the Court. If neither party enters the action for trial within the time prescribed, the notice of trial will be no longer in force. The party who enters the case for trial must pay a fee of £2 and lodge with the officer of the Court a copy of the notice of trial and two complete copies of the pleadings, including the writ. The action is then ready for trial.

*Discontinuance.*

But the parties do not always desire to proceed to trial. An action is often compromised; sometimes it goes to sleep without any definite compromise being arranged. Or it may be that the plaintiff is now satisfied that he cannot succeed. If so, he may at any time consent to judgment against himself. But, if he does so, he must pay the defendant his costs, and, moreover, he can never take any subsequent proceeding against the defendant or any one claiming through or under him for the same cause of action.

The plaintiff may also discontinue the action, or withdraw any part of it, by giving notice in writing to the defendant. It sometimes happens that a plaintiff is compelled—through lack of some necessary piece of evidence, or for some other adequate reason—to abandon his present proceedings, and yet he may desire to preserve his right to bring a fresh action under more favourable circumstances.

[1] Order XXXVI., r. 11.
[2] Order XXXVI., r. 12.

If he serves notice of discontinuance before the defence is delivered, or even after its delivery, before taking any other proceeding in the action (save any interlocutory application), he may discontinue without leave and yet can bring a second action; he must, however, pay the costs of the first action or the second action will be stayed. At any later stage of the action he can only discontinue by leave, and the Master can, and generally will, make it a condition of giving such leave that no further proceedings shall be taken in the matter.[1] After discontinuance the defendant cannot deliver a counterclaim.[2]

[1] Order XXVI., rr. 1, 4; *Hess* v. *Labouchere* (1898), 14 Times L. R. 350.
[2] *The Salybia*, [1910] P. 25.

## Chapter XVIII.

### PREPARING FOR TRIAL.

As soon as notice of trial has been given, each party feels that the day for the hearing of the case is not far distant, and he naturally begins to ask himself how he shall prove his case. He soon discovers that he is without reliable information on certain material points. His first idea is, Can I obtain this information from my opponent? It may be that he was not present when something material happened, while his opponent was. Again, there may be many matters that have hitherto been taken for granted by both plaintiff and defendant, and of which no precise legal evidence is at hand. Must this be procured, or will such matters not be disputed at the trial? The issues in the action are (or ought to be) clearly stated in the pleadings which have been delivered between the parties; but some of these issues may not be seriously contested in court. It is highly desirable, if possible, to ascertain before the trial what are the exact points on which there will be a real conflict of evidence. Hence the Master in a proper case allows one party to administer a string of questions to the other, and compels that other to answer them, subject to certain restrictions; and the admissions obtained by means of these "interrogatories" [1] often save time, trouble and expense in preparing for the trial.

But besides this discovery of facts a party may also need disclosure of documents. Some material letters have, as a rule, passed between the parties before the dispute arose, which may contain the contract sued on, or be evidence of its

[1] Both interrogatories and the answers to them are in writing, and are interchanged before the trial. An oral question addressed to a witness in the box at the trial, which he is to answer then and there, is not an "interrogatory."

breach, or of an independent tort; but the plaintiff has the defendant's letters, and the defendant has the plaintiff's; and neither set is properly intelligible without the other. Moreover, it is advisable that anyone who intends to give evidence should, if possible, before he enters the witness-box read over his own letters written at the time when the events happened; for these letters will certainly be used in his cross-examination.

Each party, therefore, desires to see all material documents in the possession of his opponent, and to take copies of the more important ones. This he can do by the process called "Discovery of Documents." And as a rule, it is wise for him to apply for this before administering interrogatories; as the documents when disclosed may render any further application unnecessary.

### Discovery of Documents.

Under this head there are three distinct cases which must be dealt with separately, as the procedure in each case is different.

(i.) It may be that one party has, in his pleadings, particulars, or affidavits referred to some document; and he cannot say that it is not material, as he relies on it himself. His opponent is, in such a case, entitled, without filing any affidavit or making any payment into Court, at once to give notice [1] that he will call and see that document, and take a copy of it, if he deems it sufficiently material. And the party who has referred to the document must produce it for inspection, if he has it in his possession at the time named in the notice; if he does not, he cannot himself put it in evidence at the trial, unless he can satisfy the judge that he had some sufficient reason for not producing it.

(ii.) In the second place, it may be that one party knows, or thinks he knows, that the other has certain material documents in his possession, though they are not referred to in any pleading, particular, or affidavit. In such a case he

[1] Under Order XXXI., r. 15.

may file an affidavit stating his belief, and the grounds of his belief, specifying the particular documents, and showing that they are material.[1] Upon this the Master can order his opponent to state on affidavit whether he has or ever had any of those documents in his possession or power, and, if he ever had one of them and has not now, when he parted with it, and what has become of it.[2] If in this affidavit he admits that he has any of the documents specified, and that it is material, it becomes at once a document referred to in an affidavit within the preceding paragraph.

(iii.) Neither party knows precisely what documents his opponent possesses. He may be able to guess at some of them; but he would like a detailed list of them all; and this he can generally obtain by paying for it. Any party may, without filing any affidavit or naming any particular document, apply to a Master for an order[3] directing any opponent in the action to disclose on oath all documents which are, or have been, in his possession or power, relating to any matter in question in the action. A plaintiff can obtain such disclosure, or "discovery" as it is called, from any necessary defendant; and one defendant can obtain such discovery from his co-defendant, if there be some right to be adjusted between them in the action. But whichever party makes the application may be ordered to pay into the "Security for Costs Account," to abide further order, a sum of money fixed by the Master. This is a useful provision; it prevents the parties from worrying each other unnecessarily.

On the hearing of the application, the Master will order such discovery only when, and only so far as, he deems it necessary either for disposing of the action or for saving costs. If he is satisfied that discovery is not necessary, he will refuse the application. In other cases he will order either general discovery, or, if he thinks fit, discovery limited to certain classes of documents; thus if particulars have been delivered, discovery will be limited to the issues as narrowed

[1] *White* v. *Spafford*, [1901] 2 K. B. 241.
[2] Order XXXI., r. 19A (3).
[3] Under Order XXXI., r. 12.

by the particulars.[1] The usual form of order is:—"That the plaintiff and defendant do respectively after delivery of defence and within ten days after service of copy receipt for deposit in court, answer on affidavit stating what documents are or have been in their possession or power relating to the matters in question in this action."

*Affidavit of Documents.*

The party against whom a general order for discovery is made must make an affidavit, specifying all the documents material to the matters in dispute in the action, which are or have been in his possession. He must describe them with particularity sufficient to identify them hereafter, should the Court think fit to order any of them to be produced. He must specify all material documents, whether he objects to produce them or not; but immaterial documents he should altogether omit. Any document which he sets out he thereby admits to be material. Hence he should make no reference in his affidavit to any document which he honestly believes to be irrelevant to the action. Every document which will throw any light on any part of the case is material, and must be disclosed. If some portion of a document or book is relevant and the rest not, he must specify which portions he admits to be relevant; he has the document or book in his possession, and he must therefore take upon himself the responsibility of stating on oath which parts do and which do not relate to the matters in question.

The party, who makes an affidavit of documents, must also specify in it which of the documents disclosed he objects to produce, and state the grounds on which he so objects. He may lawfully refuse to produce (though not as a rule to disclose) any of the following documents:—

(i.) Deeds which relate solely to his own title.

(ii.) Documents which relate solely to his own case.

(iii.) Communications between himself and his solicitor.

[1] *Yorkshire Provident Co.* v. *Gilbert*, [1895] 2 Q. B. 148.

(iv.) Documents prepared with a view to litigation.

(v.) Documents, the production of which would tend to criminate him.

(vi.) Documents which are the property of a third person, who forbids their production.

(vii.) State documents which it is contrary to public policy to produce.[1]

An Affidavit of Documents is generally in the following form :—

IN THE HIGH COURT OF JUSTICE. 1910.—R.—No. 921.

KING'S BENCH DIVISION.

BETWEEN JAMES ROBINSON . . . . . *Plaintiff,*

AND

JOHN JONES . . . . . *Defendant.*

I, JOHN JONES, of———, in the county of———, the above-named Defendant, make oath and say as follows :—

1. I have in my possession or power the documents relating to the matters in question in this action set forth in the first and second parts of the First Schedule hereto.

2. I object to produce any of the documents which are tied up in the bundle marked A. mentioned in the second part of the First Schedule hereto, on the ground that they all relate solely to my case and do not relate to the plaintiff's case or tend to support it, or to impeach my case, wherefore I say they are privileged from production.

3. I also object to produce the analysis and report mentioned in the second part of the First Schedule hereto, on the ground that it was made and came into existence for the use of my solicitor in this action, and as evidence and information as to how evidence could be obtained, and otherwise for the use of the said solicitor to enable him to conduct my defence in this action, and to advise me in reference thereto. It was prepared by the direction of my solicitor for his own use in anticipation of litigation and in the conduct of this action, and for no other purpose whatever ; wherefore I say that it is privileged from production.

4. I object to produce all the other documents set forth in the second part of the First Schedule hereto, on the ground that they are privileged. They consist of professional communications of a confidential character made to me by my legal advisers for the purpose of giving me legal advice, cases for the opinion of counsel, opinions of counsel and instructions to counsel, prepared and given in anticipation of and during the progress of this action, letters and copies of letters passing between me and my solicitor and between my solicitor and third persons either in anticipation of or during this action, and drafts and memoranda made by my counsel and solicitor for the purpose of this action.

5. I have had, but have not now, in my possession or power the documents relating to the matters in question in this action set forth in the Second Schedule hereto.

6. The last mentioned documents were last in my possession in the month of October, 1909, when I forwarded the first of them (No. 38) to the Plaintiff, and the remaining three to the editor of the "Blankton Observer."

7. According to the best of my knowledge, information and belief, I have not now, and never have had, in my possession, custody or power, or in the possession, custody or power of my solicitors or agents, solicitor or agent, or in the possession, custody or

[1] For further details as to these grounds of privilege from production, see Odgers on Pleading, 6th ed., pp. 262—265.

power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of, or extract from, any such document or any other document whatsoever, relating to the matters in question in this action or any of them, or wherein any entry has been made relative to such matters or any of them, other than and except the documents set forth in the said First and Second Schedules hereto.

FIRST SCHEDULE.

PART I.

*Originals.*

1. Letter from plaintiff to Defendant, dated January 21st, 1909.
2. Letter from Plaintiff's solicitor to Defendant, dated June 5th, 1909.
3.
4.

*Copies.*

5. Letter from Defendant to Plaintiff, dated October 4th, 1909.
6. Inventory and valuation made by John Smith on October 30th, 1909.
7.
8.

PART II.

9—36. Certain documents, numbered 9 to 36 inclusive, which are tied up in a bundle marked A, and initialled by the deponent John Jones.

37. An analysis and report made by Professor Wise on or about November 23rd, 1909, and forwarded by him to my solicitor on November 24th, 1909, for his use in this action.

Cases for the opinion of counsel, opinions of counsel, and instructions to counsel prepared and given in anticipation of and during the progress of this action.

SECOND SCHEDULE.

38. Letter written and sent by me to the Plaintiff on October 4th, 1909.
39. Copy of same.
40. Copy reply of the plaintiff to that letter dated October 6th, 1909.
41. Letter written and sent by me to the editor of the "Blankton Observer," on October 8th, 1909, with the two copies just mentioned, all three of which were inserted by him in the issue of that paper for October 10th, 1909.

Sworn by the above-named John Jones, at 1, Clement's Inn, Strand, in the County of Middlesex, this 26th day of March, 1910,

JOHN JONES.

Before me,
W. A. SMITHSON,
A Commissioner to administer Oaths in the Supreme Court of Judicature in England.

It will be observed that it has two schedules, and the first schedule has two parts. In Schedule I., Part 1, the deponent[1] sets out the documents which he has in his possession and is willing to produce; in Part 2, the documents which he has in his possession and refuses to produce. In Schedule II. he sets out documents which he once had in his possession, but has not now. The reasons for which he refuses production he states in the body of the affidavit.

[1] A person who makes an affidavit is called "a deponent."

If an affidavit of documents be in the proper form it is, as a rule, conclusive. No affidavit in reply to it will be permitted. If, however, it can be shown from the affidavit of documents itself, or from the documents disclosed in it, or from any admission on his pleadings, that the deponent has in his possession any material document which he has not disclosed, a further affidavit will be ordered.

A Master at chambers may at any stage of the action order any party to produce such of the documents in his possession or power as the Master shall think right, and may deal with such documents when produced in such manner as shall appear just.[1] Moreover, a Master may make an order for the inspection of any document in such place and in such manner as he may think fit, provided such inspection be necessary for disposing fairly of the action, or will save costs.[2] It is on an application for an order for inspection that the validity of any claim of privilege from inspection is generally tested. The party producing any book or document for the inspection of his opponent may seal or cover up any part which he can swear is not material to any issue in the action. The inspecting party is entitled to make a copy of any document produced to him. In a proper case (*e.g.*, where one party denies that he wrote an important document which purports to be in his handwriting), the Master will order the party in possession of the document to permit his opponent to take photographic or *facsimile* copies of it—of course, at his own expense.

In some cases a party to an action can obtain production of documents which are in the possession of a third person, a stranger to the action. In a proper case he may even be allowed to inspect his opponent's banking account at his bankers. An order may be made that he shall be at liberty to inspect and take copies of entries in the books of any bank for the purposes of the litigation, provided the case be one in which the applicant could, before the Act, have compelled the banker to attend at the hearing and produce his books. Such an order can be made although the account to which the entries relate is kept in the name of a stranger, provided the entries would be evidence in the action. Formerly it was necessary to compel an officer of the bank to attend the trial to produce the books, or to give evidence of their contents. But now by the Bankers' Books

[1] Order XXXI., r. 14.
[2] Order XXXI., r. 18.

Evidence Act, 1879,[1] a copy of an entry in the book of any banker or any company carrying on the business of bankers is made *primâ facie* evidence in all legal proceedings of such entry, and of the matters, transactions, and accounts therein recorded, provided that the book was at the time of the making of the entry one of the ordinary books of the bank, and the entry was made in the usual and ordinary course of business, and the book is in the custody or control of the bank. The copy must be verified by the affidavit of a partner or officer of the bank, who must state that the copy has been examined with the original entry, and is correct.

Again, where inspection of any business books is applied for, the Master may, if he thinks fit, instead of ordering inspection of the original books, order a copy of any entries therein to be furnished and verified by the affidavit of some person who has examined the copy with the original entries; such affidavit should state whether or not there are in the original book any and what erasures, interlineations, or alterations.[2] And such copies will be evidence against the party supplying them.

### Interrogatories.

Interrogatories, too, are useful whenever there is ground for anticipating that there will, at the trial, be any serious conflict as to the facts. In such cases the defendant's story must differ from that of the plaintiff, and it is most important for each of them, as far as he can, to discover how far these stories diverge. He may succeed in eliciting some admission which will facilitate the proof of his own case; if not, he may be able to pin his opponent down to some definite statement from which he cannot depart at the trial.

Neither party, however, is permitted to administer to his opponent whatever questions he pleases. He must first, on the hearing of a summons for directions, submit his proposed questions to the Master, and obtain his leave to administer them. The Master will only allow such questions as he "shall consider necessary either for disposing fairly of the cause or matter or for saving costs."[3] He will also, before giving such leave, take into consideration any offer which may be made by the party sought to be interrogated, to deliver particulars or to make admissions, or to produce

[1] 42 Vict. c. 11, as extended by 45 & 46 Vict. c. 72, s. 11.
[2] Order XXXI., r. 19A (1).
[3] Order XXXI., r. 2.

documents relating to any of the matters in question. Moreover, the party interrogating may be ordered, before delivering the interrogatories to his opponent, to pay into the "Security for Costs Account," to abide further order, a sum of money fixed by the Master.

There are certain rules [1] which determine what interrogatories may be administered and what not. The most important of these rules is that interrogatories must be relevant to the matters in issue. Not every question which could be asked a witness in the box may be put as an interrogatory. Thus, questions which are only put to test the credibility of the witness (questions "to credit," as they are called) will not be allowed, although, of course, they may be asked in cross-examination at the trial.[2] But either party may interrogate as to any link in the chain of evidence necessary to substantiate his case. So, too—in some cases—interrogatories are admissible as to matters which are only relevant in aggravation or mitigation of damages.[3]

Again, the party interrogating may put his whole case to his opponent if he thinks fit; he may also interrogate in full detail as to matters common to the case of both parties; but he is not entitled to obtain more than an outline of his opponent's case. He can compel his adversary to disclose the facts on which he intends to rely at the trial, but not the evidence by which he proposes to prove those facts. He cannot claim to "see his opponent's brief," or ask him to name his witnesses.[4] He is entitled to know precisely what is the charge made against him, and what is the case which he will have to meet. But he is not entitled to discover in what way his opponent intends to establish that charge or prove his case.

### *Answers to Interrogatories.*

The party interrogated must, within the time prescribed by the Master, file an affidavit answering in full detail all the interrogatories to which he can raise no sound objection. He must answer them fully and frankly and with scrupulous accuracy. He may answer guardedly and make qualified admissions, so long as both the admission and the qualification are clear and definite. He may answer "Yes" or "No" simply, so long as it is clear how much is thus admitted or denied. So, too, it is quite admissible to say, "I do not know," where the matter is neither within his own knowledge

[1] See Odgers on Pleading, 6th ed., pp. 270—277.
[2] See the concluding words of Order XXXI., r. 1.
[3] See *Scaife* v. *Kemp & Co.*, [1892] 2 Q. B. 319.
[4] See, for instance, *Hooton* v. *Dalby*, [1907] 2 K. B. 18.

or that of his servants. He is not bound to procure information from strangers for the purpose of answering. If, however, he "is interrogated about acts which are done in the presence of persons employed by him, he is bound to" make inquiries of them,[1] for their knowledge is his knowledge, if it was acquired by them in the ordinary course of their employment by him.

If the party interrogated has any legal objection to answering any interrogatory, he must take that objection in his affidavit in answer. Such objections are of many kinds, *e.g.*, that the interrogatory is irrelevant, or not put *bonâ fide* for the purposes of the present action, or that it inquires into the evidence by which the party interrogated intends to establish at the trial the facts set out in his pleadings, or that it inquires into the contents of a written document, or that it is "prolix, oppressive, unnecessary or scandalous."[2] A solicitor, if interrogated, can also claim his professional privilege, and refuse to disclose any matters imparted to him in confidence by his client. Questions which tend to incriminate the party interrogated are not scandalous, unless they are either irrelevant or "fishing"; they will not, therefore, be struck out or set aside; they may be administered, but the party interrogated will not be compelled to answer them, if he can swear that to do so would tend to incriminate him. That the interrogatory will tend to incriminate third persons is no objection, if it be put *bonâ fide* for the purposes of the present action. That to answer it would expose the party interrogated, or third persons, to civil actions is no objection.

If the answers are insufficient or evasive, the party interrogating may by means of a notice[3] under the summons for directions apply for a further and better affidavit in answer. The notice should specify the interrogatories or parts of interrogatories to which a better answer is required. It

[1] *Bolckow, Vaughan & Co.* v. *Fisher* (1882), 10 Q. B. D. 161; and see *Rasbotham* v. *Shropshire Union Railways and Canal Co.* (1883), 24 Ch. D. at p. 113.

[2] Order XXXI., rr. 6. 7. A "scandalous" interrogatory is an insulting or degrading question, which is irrelevant to the matters in issue. "Certainly nothing can be scandalous which is relevant:" *per* Cotton, L. J., in *Fisher* v. *Owen* (1878), 8 Ch. D. at p. 653.

[3] Order XXX., r. 5.

may ask in the alternative that the deponent be examined *vivâ voce* before a Master; but such an order is seldom made. So, too, if the deponent introduces into his affidavit irrelevant matter, which prevents his opponent from making a fair use of the answers at the trial, the party interrogating may apply to have such matter struck out.

Any party failing to answer interrogatories, or to discover or produce or allow inspection of documents as ordered, is liable to attachment; and, if a plaintiff, to have his action dismissed for want of prosecution; if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had never pleaded. But such extreme penalties will only be enforced in the last resort, where it seems clear that the party in default really intends not to comply with the order of the Court. Hence, before making any application of this kind, the other party should obtain a peremptory order insisting on such discovery being made within a time specified in the order.

It will be observed that by means of interrogatories either party can compel his opponent to admit facts which are within his own knowledge or that of his agents or servants, and, moreover, to make such admissions on oath. There are many other ways in which one party can obtain admissions from the other during the progress of the action, if the other is willing to make them. Thus, admissions are frequently made on the pleadings. Anything alleged by one party in his pleading which the other does not deny is taken to be admitted.[1] Again, either party may serve on the other a notice to admit facts; and though the person served with such a notice may refuse to admit them, a refusal to do so may affect costs.[2] Such a notice need not be confined to matters within the knowledge of the party on whom it is served. So, too, either party may serve on his opponent a notice to inspect and admit documents. Admissions made on receiving this notice are generally made "saving all just exceptions to their admissibility in evidence." Moreover, a solicitor can always bind his client by a formal admission made in the course of the litigation; and so can counsel or solicitor in open Court at the trial, but any such admission in Court may be withdrawn if made carelessly or under a misapprehension.[3]

[1] Order XIX., r. 13; but see Order XXI., rr. 4, 21.

[2] Order XXXII., r. 4; and see *Lever Bros.* v. *Associated Newspapers*, [1907] 2 K. B. at pp. 628, 629.

[3] As to the authority of counsel to compromise, see *post*, pp. 1429, 1430.

### Inspection of Property.

It may also be advisable for one party to inspect premises or things which are in the possession of his opponent. Thus, if a landlord alleges that his tenant has left the demised premises in a bad state of repair, both he and the tenant may reasonably desire to send a surveyor over the property to report as to its condition.[1] So, in an action for goods sold and delivered, the purchaser may wish to inspect the bulk and the vendor the sample. In such cases the Master has power under Order L., r. 3, upon the application of either party to the action, and upon such terms as may be just, to make an order for the detention, preservation,[2] or inspection of any property or thing, which is the subject of the action or as to which any question may arise therein. A Master may also under the same rule authorise any persons to enter upon or into any land or building in the possession of any party to the action, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence. Again, where one party to an action claims that the other party is detaining from him specific property other than land, and the other does not claim that he owns it, but merely asserts that he has a lien or charge upon it, the Master may make an order that the property be handed over to the party claiming it upon his paying into Court the amount claimed in respect of the lien or charge and costs to abide the result of the action.[3]

### Advice on Evidence.

Having thus obtained all the information he can from his opponent or from the inspection of documents or property,

[1] As to ancient lights, see the judgment of Lord Macnaghten in *Colls* v. *Home and Colonial Stores*, [1904] A. C. at pp. 185—195.

[2] This may even extend to ordering that a steam vessel in a colonial port shall be brought home: *New Orleans S.S. Co.* v. *London Provincial, &c., Insurance Co.*, [1909] 1 K. B. 943.

[3] Order L., r. 8; and see *Gebrüder Naf* v. *Ploton* (1890), 25 Q. B. D. 13.

each party seriously begins to get his own evidence in order. This may involve a careful search for missing letters or account books, or the inspection of ancient records and registers and the procuring of certified copies of their contents. He must not lose his case for want of some formal piece of proof. The junior counsel on each side is generally asked at this stage of the proceeding to advise what further evidence is necessary to place everything in proper order for the hearing. He in the first place ascertains from the pleadings what are the precise issues to be tried. Then, if the burden of proof[1] on any issue lies on his client, he states *seriatim* what witnesses must be called, and what documents must be put in evidence on that issue. He also advises what evidence is necessary to rebut the case of the adversary on the other issues, and what evidence should be given in aggravation or mitigation of damages.

It is not necessary, as we have seen, for either party to prove any fact up to the hilt; *primâ facie* proof is, as a rule, sufficient. An admission contained in a letter will generally shift the burden of proof. Moreover, neither party need prove anything which the law presumes in his favour, and there are some facts which need not be proved at all, for the Court will take judicial notice of them.[2]

### *Securing the Attendance of Witnesses at the Trial.*

The witnesses, whom it is desirable to have in attendance at the trial, must be served with a formal order to attend the trial (which is called a *subpœna*), unless there is no doubt of their willingness to attend. If it is wished that any one of them should bring a particular document with him, he must be served with a *subpœna duces tecum* specifying the document.

It may, however, turn out that some material witness is too ill to attend the trial, or is about to leave the country before the trial, or is already absent abroad. In the first two cases the person who needs his evidence must at once

[1] As to burden of proof, see *ante*, pp. 1096, 1097.
[2] See *ante*, pp. 1096, 1099.

apply for "a commission" to take his deposition before the trial. Some barrister or solicitor is appointed commissioner; he goes to the bedside or other place where the witness is, accompanied by the parties or their representatives. The witness is sworn and tells his story, is cross-examined and re-examined. The commissioner takes down all the evidence and any objections to any part of it. This he then reads over to the witness, and both he and the witness sign it. As soon as this is done, the record becomes a deposition and is subsequently filed in Court. It may be necessary to apply to postpone the trial while this is taking place.

But there is more difficulty if the witness be already abroad so that he cannot be served with a *subpœna*. In some cases an order will be made for a commission as above described, and then the evidence of the witness will be taken abroad before a commissioner or examiner appointed by the English Court or judge, and the deposition taken before him can be used at the trial in England unless the witness can then be produced personally.

Several foreign governments, however, object to commissions being issued, and to examiners administering oaths to witnesses within their dominions. Hence the Foreign Office, at the request of the Lord Chancellor or the Lord Chief Justice, frequently sends through diplomatic channels "a letter of request" addressed to the tribunal of such other country, asking the judges of that tribunal to order the required evidence to be taken and remitted to the English Court. This plan is found to be cheaper than the writ of commission, which, however, is still employed for the examination of witnesses in the United States of America, and occasionally in our Colonies.

The plaintiff himself will not, as a rule, be allowed thus to give his evidence abroad; it should be given before the jury here. But a defendant, if resident abroad, will be allowed this indulgence. No order will be made either for a commission or for letters of request, if it can be shown that the witnesses could be brought to England without much greater expense, or that witnesses now in England could give

the same evidence. Sometimes the mere delay, which will thus necessarily be caused, is a sufficient reason for refusing the application.

### *Evidence on Affidavit.*

In the Chancery Division evidence is frequently taken on affidavit instead of the witnesses personally appearing in court. And indeed in any Division of the High Court this can be done if all parties consent. The evidence is taken before the trial. The plaintiff's affidavits must be filed and delivered within fourteen days after consent given, or such other time as may be agreed upon or allowed.[1] Within a like period counter affidavits may be delivered by defendant. Affidavits in reply may be filed within seven days, or such other time as may be agreed upon or allowed, after the expiration of the preceding period; these must be confined to matters "strictly in reply."

When evidence is thus taken by affidavit any party desiring to cross-examine a deponent may serve upon the party filing the affidavit a notice in writing, requiring the production of the deponent for cross-examination at the trial. Such notice must be served before the expiration of fourteen days after the time allowed for filing affidavits in reply, or within such time as may be specially appointed. Unless such deponent is produced accordingly, his affidavit cannot be used as evidence, unless by special leave of the Court. The attendance of a deponent for cross-examination may be compelled in the same way as the attendance of a witness to be examined.

The Court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of a witness be read at the hearing or trial, on reasonable conditions, unless it appears that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced.[2] It is unfortunate that so little use is made of this power. The deposition of a witness taken on commission or under letters of request, as already described, may also be read in evidence if the attendance of the witness himself cannot be procured.

In all other cases, in the absence of any agreement in writing between the solicitors of all parties, the witnesses at the trial of an action or at an assessment of damages must be examined *vivâ voce* in open court.

### *Securing the Production of Documents at the Trial.*

Each party must, in good time before the hearing, consider what documents will be required to prove his case at the

[1] Order XXXVIII., rr. 25—29.

[2] Order XXXVII., r. 1; and see s. 3 of the Judicature Act, 1894 (57 & 58 Vict. c. 16), and r. 7 of Order XXX.

trial, and also what documents will be needed for the cross-examination of the witnesses called against him. On this several questions arise: Are such documents still in existence? In whose handwriting are they? Are they within the jurisdiction of the Court? If the originals cannot be produced, is any secondary evidence of their contents procurable? If so, is it admissible? The rule is that the originals must be produced in Court, if they still exist and can be found within jurisdiction. If the original be produced, it may be necessary to call witnesses to prove the handwriting; if it be not produced, there may be considerable difficulty in obtaining permission to read a copy.[1]

In order to facilitate the proof in court of the documents which are either in his own or his opponent's possession, each party should, a reasonable time before the trial, serve on his opponent two notices:—

(a) A notice to produce at the trial the documents which are in his opponent's possession, and which he requires his opponent to bring to the Court.

(b) A notice to inspect and admit the documents which are in his own possession, and which he invites his opponent to call and inspect before the trial, and then to make a formal admission that they were written by the person in whose handwriting they purport to be.

Both these notices serve a useful purpose. Unless a party has given to his opponent notice to produce a document in his possession, he cannot give any secondary evidence of its contents. And unless he gives notice to inspect the documents in his own possession, his opponent will not admit them, and then they must be strictly proved at the trial. If, after notice to admit, his opponent denies his own handwriting, he will probably, even though he win the action, have to pay the costs of proving this document. But a party, if successful, will not be allowed such costs, unless he served on his opponent notice to admit it, and so gave

[1] The law on these points has been briefly summarised on pp. 1088 *et seq.*

him the opportunity of saving the expense.[1] There is power to serve also a similar Notice to Admit Facts,[2] but this step is seldom taken, as the opponent is not compelled to make any such admission.

But there is more trouble when the documents are in the possession of a third person, not a party to the action. If the person who holds the document be within the jurisdiction of the Court he can, as we have already seen, be served with a *subpœna duces tecum*; but if he be outside the jurisdiction, all that can be done is to impress upon him the importance of his attending the trial or sending the document, and to offer him such inducements as may be necessary.[3]

### *Place and Mode of Trial.*

The Master has no doubt dealt with these matters long ago on a summons for directions. But circumstances may have changed since then; issues may have been raised which alter the complexion of the case. Hence the Master has power to vary the mode or place of trial for sufficient cause,[4] as, for example, if he is satisfied that there is no probability of a fair trial in the place originally fixed, because a local newspaper of extensive circulation has recently published unfair attacks on either party with reference to the subject-matter of the action; or if strong prejudice against either party has been created in the locality by any other improper method.

Again, he may think it right to vary the mode of trial by directing a trial by judge and jury, instead of a trial by judge alone; or by a special instead of a common jury; or by ordering that the action shall be tried by an official or special referee.[5] A Master may also order different questions of fact arising in an action to be tried by different modes of trial, or that one or more questions of fact be tried before others.[6]

[1] Order XXXII., r. 2.
[2] *Ib.*, r. 4.
[3] See *ante*, p. 1091.
[4] Order LIV., r. 32.
[5] See *ante*, p. 999.
[6] See Order XXXVI., r. 8.

In the Chancery Division an action is always tried by a judge alone; a jury is never seen there. In any other Division of the High Court an action may be tried in one of three ways:—

(a) By judge alone;

(b) By judge and jury (special or common);

(c) By a judge with assessors.

Assessors are professional or scientific persons who assist the judge with their special knowledge; they are most frequently seen in the Admiralty Court in cases of collision between two vessels. But if any issue in an action in the King's Bench Division requires scientific investigation, an order may be made for the trial of the action before a judge with assessors.

In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage—actions in which the damages are necessarily unliquidated—either party can secure a trial by jury as of right merely by giving notice in proper time that such is his wish.[1] In all other cases the trial will be by judge alone, unless an order be made at chambers for a trial by jury. But an order for a jury will be made if either party applies for it within ten days after notice of trial has been given,

(i.) unless the action is one which could, without any consent of the parties, have been tried without a jury before the Judicature Act,[2] or

(ii.) unless the Master sees clearly that the case involves prolonged examination of documents or accounts, or a scientific or local investigation which cannot conveniently be made by a jury.[3]

If the parties allow the prescribed period of ten days to pass without applying for a jury, then the Master can make whatever order he thinks right as to the mode of trial. So either party can obtain a special jury, if he gives notice in proper time;[4] if he applies subsequently, he cannot obtain a special jury as of right; but there is generally no difficulty in obtaining one, unless the application is made with the object of delaying the trial.

If the trial is to be by judge and jury, whether special or common, either party can in a proper case obtain an order for the jury to have a preliminary "view" of the premises or locality to which the action relates.

[1] Order XXXVI., r. 2. And see *Sackville-West* v. *Att.-Gen.* (1909), 26 Times L. R. 33.
[2] Such as Chancery suits or Admiralty actions: *The Temple Bar* (1885), 11 P. D. 6.
[3] Order XXXVI., rr. 4—7.
[4] *Ib.*, r. 7.

## Chapter XIX.

### Proceedings in an action for the recovery of land.

So far in this Book we have dealt almost exclusively with actions brought to recover a debt or damages or other relief from a person. But every system of jurisprudence recognises also proceedings in which the plaintiff asserts his ownership or claims possession of a chattel or of land. Thus, in England, there were formerly three classes of actions: personal actions, in which the plaintiff sought to recover a debt or damages from the defendant; real actions, in which he sought to establish his title to land or other hereditaments; mixed actions, in which he sought only to establish his right to possession of land. All forms of action are now abolished,[1] but there still inevitably remains the distinction between actions *in personam* brought against an individual, actions *in rem*, which determine questions of title, and possessory actions which decide merely the right to have physical control of the property in dispute.

When the Judicature Act came into force in 1875, the only possessory action relating to land was the action of ejectment. The plaintiff in such an action asserted no freehold title in himself; he only claimed to be the lessee, or otherwise entitled to possession of the land in dispute. No question arose as to the ownership of that land, unless and until the defendant denied the title of the plaintiff's lessor. This issue, however, was frequently raised when the procedure in all real actions had become cumbrous and expensive. The plaintiff asserted that A. had granted him a lease, under which he had entered on the land demised, and had been ousted therefrom. The defendant admitted the lease, the entry, and the ouster, and merely denied the right of A. to grant the plaintiff that lease. In this way the parties obtained in an action which was in form merely possessory a decision as to the title to the land which should more properly have been pronounced in a real action.

[1] See *Hanmer* v. *Flight* (1876), 35 L. T. 127.

The action of ejectment has now been superseded by the modern action for the recovery of land, while the place of the former real action is taken to some extent by an action for a declaration of title.[1]

## Action for the Recovery of Land.

The procedure in an action for the recovery of land differs in many respects (as that in real and mixed actions did formerly) from the procedure in personal actions.

This difference arises not only from the special nature of the property that forms the subject-matter of the action, but also from an ancient and estimable rule of law which from the earliest time respected and protected possession whenever it had been peaceably acquired—a respect which was enhanced by the fear that any interference with possession would probably lead to a breach of the peace. The law presumed that anyone in possession of land was entitled to hold possession of it. There is an old saying, and still a true one, that "an Englishman's house is his castle."[2] Hence it was a rule of the common law that anyone who was out of possession must recover the land by the strength of his own title, and not by reason of any defect in the title of the person in possession.[3] Even though it was abundantly clear that the person in possession had no right to be there, still the claimant in ejectment could not turn him out unless he could show in himself a title which was—*primâ facie*, at all events—good against all the world.

If the person in possession could show that some third person had a better title than the claimant, the action failed even though such third person had not placed the defendant in possession. This rule that the claimant must recover by the strength of his own title still remains the law; and to it may be traced most, if not all, the special features of the procedure in an action for the recovery of land.[3] Every presumption is still made in favour of the person in possession. He cannot be made to disclose his title; nor

[1] As to this, see *ante*, p. 1149.
[2] See *ante*, p. 6.
[3] See *ante*, p. 433.

can he, as a rule, be compelled to assist the claimant to establish his.

*Parties.*

The proper plaintiff is the person who is entitled to the immediate possession of the property. He may either be the freeholder or the lessee of the freeholder. As between freeholders the first tenant for life is the proper plaintiff, for he is the person entitled to the immediate possession of the property; there is no need to join any remaindermen or reversioners. Where the person who claims possession is a tenant in common, he can sue alone, without joining the other co-tenants in common as co-plaintiffs. All joint tenants, however, must be joined on the writ.[1]

A lessee to whom a lease has been granted can also bring an action although he has never yet been in actual possession of the land demised; for an *interesse termini*[2] is now a real right, a right of property, and not a mere contractual right.[3] Again, a person to whom no lease has been granted, but who has merely an agreement for a lease, can bring ejectment if the agreement or correspondence is such that a Court of equity would decree specific performance of the contract. He has an equitable right to possession. He must, however, join his lessor in any action he may bring to recover possession of the land, for a person who has only an equitable right to enter cannot sue in ejectment without making the owner of the legal estate either plaintiff or defendant.[4]

To this rule, however, two exceptions have been made by statute :—

(i.) By the Judicature Act, 1873,[5] a mortgagor, if entitled for the time being to the possession or receipt of the rents or profits of any land,

[1] *Lauri* v. *Renad*, [1892] 3 Ch. 402 ; *Roberts* v. *Holland*, [1893] 1 Q. B. 665.

[2] See *ante*, p. 868.

[3] Such a lessee could not bring an action of trespass, for he has never been in possession.

[4] This appears to be still clear law : *Allen* v. *Wood* (1893), 68 L. T. 143. Nevertheless, in *General Finance, &c., Co.* v. *Liberator Permanent Building Society* (1878), 10 Ch. D. at p. 24, Jessel, M.R., said : "The jurisdiction in equity and common law is now vested in every court of justice, so that no action for ejectment or, as it is now called, an action for the recovery of land, can be defeated for the want of the legal estate where the plaintiff has the title to the possession."

[5] 36 & 37 Vict. c. 66, s. 25 (5).

may sue for such possession or for the recovery of such rents or profits in his own name only, so long as the mortgagee has not given notice of his intention to take possession, or to enter into the receipt of the rents and profits.[1]

(ii.) By the Conveyancing Act, 1881,[2] every condition of re-entry contained in a lease shall be annexed, and incident to, and go with the immediate reversion, notwithstanding severance, and shall be capable of being enforced by the person from time to time entitled to the income of the land leased. This section was no doubt primarily intended to deal with cases in which the reversion has been severed; but it has been construed as meaning that a person who is only equitably entitled to the rent reserved by a lease could enforce a proviso for re-entry against the tenant, although the legal reversion immediately expectant on the termination of the lease was vested in another person who is no party to the action.[3]

If the person claiming possession of freehold property has died, the proper plaintiffs in an action for the recovery of land are at first his personal representatives; for on them by the Land Transfer Act, 1897,[4] the freeholds, both legal and equitable, of a deceased person now devolve until by the assent or conveyance of such personal representatives they vest in the devisee or heir at law. As soon as there has been unequivocal assent the devisee or heir is the proper plaintiff.

Hence, if a freeholder dies leaving a will, his land at once vests in his executors, and they alone can bring an action for the recovery of the land until they assent to its vesting in the devisee (if any) named in the will, or, if none be named, in the heir. Should the executors unduly postpone assent, it would be open to the devisee or heir to apply to the Court for leave to bring the action in the name of the executors, and this will in a proper case be granted upon terms which adequately indemnify the executors against liability for costs.

If, however, a freeholder dies intestate, apparently his lands at once vest in his heir until letters of administration be granted to another.[5] As soon as an administrator is thus appointed, the legal estate in the land passes to him and remains in him until he assents to its being re-vested in the heir. Again, if a man die leaving a will by which he devises his freeholds, and appoints executors who predecease him, the legal estate will,

[1] But see *Matthews* v. *Usher*, [1900] 2 Q. B. 535.

[2] 44 & 45 Vict. c. 41, s. 10 (1).

[3] This view receives some colour from the decision of the Court of Appeal in *Turner* v. *Walsh*, [1909] 2 K. B. 484; *sed quære*.

[4] 60 & 61 Vict. c. 65, s. 1.

[5] See the dictum of North, J., in *John* v. *John*, [1898] 2 Ch. at p. 576; and Ingpen on Executors, p. 196.

it seems, pass to the devisee under the former law, and remain in him until the Court grants to someone else letters of administration *cum testamento annexo.*

The person actually in possession of the land must be made defendant. If several persons be in occupation the plaintiff must join them all as defendants if he desires to recover the whole of the premises mentioned in his writ. But it is not necessary to join the landlord or any person not in possession who is in receipt of the rents and profits. The tenant is bound, under penalty of three years' rent, "forthwith" to give notice to his landlord that a writ in ejectment has been served on him.[1] And the landlord can then at once obtain leave to appear and defend the action.[2]

### *Joinder of Causes of Action.*

As a rule, since the Judicature Act, any number of causes of action between the same plaintiff and the same defendant may be joined on one writ. But in an action for the recovery of land the plaintiff has not so large a liberty. Nevertheless, rule 2 of Order XVIII. permits the joinder of practically every kind of claim which a plaintiff would ordinarily wish to join. Under this rule the plaintiff may without leave join with his claim for recovery of the possession of the land a claim for—

1. Mesne profits.[3]
2. Arrears of rent.[3]
3. "Double value."[4]

[1] Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 209.

[2] Order XII., rr. 25, 26 and 27; see *post*, pp. 1253, 1254.

[3] If a person who has no title enters into possession of land, the rents or profits which he does in fact receive or make, or which he might have received or made, during his occupation are called "mesne profits"; and these he must pay over to the true owner as compensation for the trespass which he has committed. "Rent," on the other hand, is the money which is payable by a tenant to his landlord for the use and occupation of land under a contract express or implied. A claim for rent is therefore liquidated, while a claim for mesne profits is always unliquidated. Mesne profits can be claimed from the date of the defendant's entry on the land till possession is given up to the plaintiff: *Southport Tramways Co.* v. *Gandy*, [1897] 2 Q. B. 66.

[4] A tenant who wilfully holds over after the expiration of his term of tenancy and "after demand made and notice in writing" is liable to "pay at the rate of double the yearly value" of the land during the time he so holds over (4 Geo. II. c. 28, s. 1). A tenant who has given his landlord a notice to quit, and who fails to give up possession of the land at the time specified in such notice, is liable to pay double rent during the

4. Damages for breach of any contract under which the land or any part of it is held.

5. Damages for any wrong or injury to the premises claimed.[1]

If the plaintiff desires to join any other claim not included in the above list, he must apply to the Master for leave, though it would be seldom that any other such claim could be conveniently laid in an action for the recovery of land.[2]

The rule, it will be observed, refers only to causes of action, but, as we have seen,[3] the same cause of action may entitle the plaintiff to relief of various kinds. Therefore no leave is necessary to join a claim for a receiver,[4] or an account, or an injunction, or for a declaration which merely tends to establish the plaintiff's right to possession, as all these things are simply machinery to enforce the plaintiff's one cause of action.[5] But a claim for a substantive declaration of title (not merely auxiliary to a claim for possession) is a separate cause for action, and cannot be joined without leave.[6]

If the defendant considers that several causes of action have been joined in one writ which cannot conveniently be tried together, he may apply under Order XVIII., rr. 8, 9, to have some excluded, even though no leave was necessary for their joinder.[7] Where leave is necessary the plaintiff must file an affidavit and apply for leave to a Master or district registrar. Strictly he should do this before the writ is issued; but leave can be given subsequently.[8] If claims be improperly joined without leave, still this irregularity is waived if the defendant, without raising the objection, subsequently takes any step in the action, which would be neither

time he continues in possession (11 Geo. II. c. 19, s. 18). Both these penal sums are still recoverable, but they are very rarely claimed. A claim for double value can be joined on the writ in an action for the recovery of land; but a claim for double rent apparently cannot. Penal rents reserved in a lease can now be enforced only so far as special damage can be established (8 Edw. VII. c. 28, s. 25).

[1] The rule also permits a claim for possession to be raised incidentally in an action for foreclosure or redemption.

[2] See, however, *Cook* v. *Enchmarch* (1876), 2 Ch. D. 111, where leave was granted to join a claim for the cancellation of deeds relating to the land.

[3] *Ante*, p. 1138.

[4] See *Gwatkin* v. *Bird* (1883), 52 L. J. Q. B. 263. The Court will appoint a receiver whenever it is just and convenient to do so, even when the plaintiff claims the legal estate: Judicature Act, 1875 (36 & 37 Vict. c. 66), s. 25 (8).

[5] *Gledhill* v. *Hunter* (1880), 14 Ch. D. 492.

[6] Order XVIII., r. 2.

[7] See *Saccharin Corporation* v. *Wild*, [1903] 1 Ch. 410.

[8] *Lloyd* v. *Great Western Dairies Co.*, [1907] 2 K. B. 727.

necessary nor useful if he intended to rely on that objection.[1] He is supposed to know the law, and therefore has notice of the irregularity as soon as he sees the writ or pleading.

### *Indorsement on Writ, &c.*

The writ must always define clearly the premises claimed, so that the sheriff may know into possession of what lands he is to put the plaintiff if he succeed in the action. If the action be brought by a landlord against his tenant, the date of the lease must be given; and it is better always to state the commencement and the length of the term, but this is not absolutely necessary.[2] The writ may be indorsed (i.) generally, (ii.) for trial without pleadings, (iii.) specially.

(1) *General Indorsement.*—A writ may be generally indorsed as follows:—

The plaintiff's claim is as against all the defendants to recover possession of the house known as No. 17, King Street, Banbury, in the county of Oxford, now in the occupation of the defendants B., C. and D., as sub-tenants of the defendant A.,

And also as against the defendant A. for £50 arrears of rent due from him under the lease of the said premises granted him by the plaintiff, and £100 for damages for breach of the covenants to repair,

And for mesne profits,

And for a receiver.

(2) *Indorsement for Trial without Pleadings.*

The plaintiffs' claim is to recover possession of the farm known as Highfield, in the parish of White Lackington, in the county of Somerset, of which John Jones was seised in fee at the date of his death (November 23rd, 1908). The plaintiff A. is his eldest son and heir. The co-plaintiff B. is the administrator of the estate and effects of the said John Jones appointed by letters of administration granted by the Court on February 16th, 1909. After the death of the said John Jones the defendant wrongfully took and still retains possession of the farm.

And for mesne profits at the rate of £200 a year from November 23rd, 1908, till possession be given to the plaintiffs.

If the defendant appears, the plaintiffs intend to proceed to trial without pleadings.

(3) *Special Indorsement.*—At first no writ could be specially indorsed with a claim for the recovery of land. But in 1883 the following words were added to Order III., r. 6:—

"(F) In actions for the recovery of land (with or without a claim for rent or mesne profits) by a landlord against a tenant whose term has expired or has been duly determined by notice to quit, or against persons claiming under such tenant."

[1] *Per* Cave, J., in *Rein* v. *Stein* (1892), 66 L. T. at p. 471.
[2] *Hanmer* v. *Clifton*, [1894] 1 Q. B. 238.

And in 1902 these further words were inserted in that rule: "or has become liable to forfeiture for non-payment of rent."[1]

Hence a writ can now be specially indorsed with the claim for the recovery of land in four cases, viz., where the defendant is:—

(1) a tenant whose term has expired, or

(2) a tenant whose term has been duly determined by a notice to quit, or

(3) a tenant whose term has become liable to forfeiture for non-payment of rent,[2] or

(4) a person claiming under any such tenant, including a tenant at will.

And in each of these cases the plaintiff may include in the special indorsement a claim for rent or mesne profits[3] although such a claim is unliquidated.

### (i.) Where the Term has Expired.

*Statement of Claim.*

1. The Plaintiff's claim is to recover possession of a cottage and two fields, situate at Whetstone, in the Parish of Finchley, in the county of Middlesex, and numbered 490, 491, and 492 on the Tithe Apportionment Map.

2. The said cottage and fields were demised by the Plaintiff to the Defendant by a lease in writing, dated September 17th, 1900, for the term of seven years, at the yearly rental of £60, payable quarterly.

3. The said term expired on September 29th, 1907.

4. The Defendant has not paid the quarter's rent which fell due on September 29th, 1907, or any part thereof; and the plaintiff claims the sum of £14 10*s.* 0*d.* for arrears of rent, less tax.

5. The Plaintiff also claims mesne profits from September 29th, 1907, till possession of the said cottage and fields is delivered up to him.

### (ii.) Where the Tenancy has been duly Determined by a Notice to Quit.

*Statement of Claim.*

1. The Plaintiff's claim is to recover possession of the premises known as Laburnum Lodge, Manchester Road, in the borough of Wigan, in the county of Lancashire.

2. The Defendant held the said premises of the Plaintiff as tenant from year to year. His tenancy commenced on March 25th, 1903.

3. The Plaintiff duly determined the said tenancy by serving on the Defendant on September 27th, 1908, a notice to quit the said premises on March 25th, 1909; yet the Defendant wrongfully holds possession of the said premises.

4. The Plaintiff also claims the mesne profits of the said premises from March 25th, 1909, till possession be delivered up.

[1] This can only be the case where the lease contains a proviso for re-entry on non-payment of the rent for a specified period, which has expired before the issue of the writ.

[2] A plaintiff who claims possession of land on a forfeiture can only indorse his writ specially in one case, that of a forfeiture for non-payment of rent: *Burns* v. *Walford*, [1884] W. N. 31; *Arden* v. *Boyce*, [1894] 1 Q. B. 796. To that case s. 14 of the Conveyancing Act, 1881, does not apply: see *ante*, p. 436. The tenant can only obtain relief under the Common Law Procedure Acts, 1852 and 1860 (15 & 16 Vict. c. 76, ss. 210—212; 23 & 24 Vict. c. 126, s. 1).

[3] See *ante*, p. 1249.

(iii.) Where the Term is Forfeited for Non-payment of Rent.

*Statement of Claim.*

1. By an agreement in writing, dated September 22nd, 1907, the Plaintiff let to the Defendant a house, No. 52, Broad Street, Bristol, for the term of three years from September 29th, 1907, at the yearly rent of £120, payable quarterly.

2. By the said agreement, the defendant promised to pay the said rent in equal quarterly instalments on the usual quarter-days. The said agreement also contained a clause entitling the Plaintiff to re-enter in case the said rent was more than twenty-one days in arrear.

3. The Defendant took possession of the said house under the said agreement, and is still in possession thereof. He paid the Plaintiff rent up to Lady Day, 1908; he has paid no rent which has accrued since that day.

And the Plaintiff claims:—

(i.) Possession of the said house;

(ii.) £150, being five quarters' arrears of rent;

(iii.) Mesne profits from date of writ (June 25th, 1909) till possession of the said house is delivered to the Plaintiff.

The service of the writ in actions for the recovery of land is the same as in all other actions except in the case of "vacant possession." If no one is in possession of the land, the writ may be served by posting a copy of it on the door of a dwelling-house or in some other conspicuous part of the property.[1] But this course can only be taken if the tenant has abandoned possession; it is not permissible if, although he has discontinued to occupy the premises, he still retains the virtual control of them.[2]

The plaintiff cannot sign judgment on such a service without an order, and then only judgment for possession. Judgment *in personam* for arrears of rent or mesne profits cannot be obtained, if service was effected in this way.

Appearance in an action for recovery of land differs from appearance in an ordinary action in two respects:—

(1) Appearance may be limited to part only of the premises claimed.[3]

(2) Any person not named defendant on the writ who, at the date of the writ, is in possession of any part of the premises claimed may by leave appear and defend.[4]

Leave must be obtained from a Master on affidavit, and

[1] Order IX., r. 9.
[2] *Doe* d. *Lord Darlington* v. *Cock* (1825), 4 B. & C. 259.
[3] Order XII., r. 28.
[4] Order XII., rr. 25, 26, 27.

may be granted although the applicant has since the writ been turned out of possession.[1]

A landlord whose tenant is in possession can obtain leave under these rules;[2] when entering appearance he must state that he appears as landlord.

A mortgagee who is a landlord by reason of an attornment clause in the mortgage deed may appear under these rules and defend the action; no other mortgagee can. But in a proper case such a mortgagee who is not a landlord may obtain leave to defend the action in the name of the mortgagor.[3]

An equitable tenant for life who is in actual receipt of the rents and profits of the land may be added under these rules, where his trustee is sued alone.[4]

Judgment may be signed against any defendant who does not appear for the whole or for any part of the property claimed. The form of the judgment is that the person whose title is asserted on the writ shall recover possession of the land, or of that portion of it, which is in the possession of the defendant who has not appeared. When the sole claim in the action is for possession of the land, the defendants who do not appear will not have to pay costs.[5]

When the plaintiff has indorsed his writ generally, he must shortly after appearance take out a summons for directions under Order XXX. When the writ is specially indorsed under Order III. r. 6F, the plaintiff may, if he thinks fit, take out a summons for summary judgment under Order XIV.; and on the hearing of such a summons a tenant will be ordered to give up possession of the demised premises to the plaintiff, if the term has expired, or has been determined by notice to quit, or even if the lease has been forfeited through non-payment of rent. It is, however, expressly provided that in the third case the defendant shall "have the same right to relief after a judgment under this Order as if the judgment had been given after trial;" that is, he will have the

[1] *Minet* v. *Johnson* (1890), 63 L. T. 507.
[2] Order XII., r. 27.
[3] *Jacques* v. *Harrison* (1884), 12 Q. B. D. 165.
[4] *Longbourne* v. *Fisher* (1878), 47 L. J. Ch. 379.
[5] Order XIII., r. 8. See Annual Practice, 1911, vol. i., pp. 132, 133.

right to apply within six months to have the judgment set aside on payment of all rent in arrear and costs, under s. 210 of the Common Law Procedure Act, 1852.[1] A mortgagor who by the terms of the mortgage deed attorns tenant to the mortgagee, is a tenant within Order III., r. 6F; so is a tenant at will; and judgment can be signed against either under Order XIV. if the tenancy has been duly determined.[2] But Order XIV. is only intended to apply to clear and simple cases, *e.g.*, where there is no dispute as to the existence between the parties of the relation of landlord and tenant, either because the plaintiff and defendant are the original lessor and lessee, or because the defendant has estopped himself from denying the plaintiff's title by paying him rent or in any other way.[3]

On a summons under either rule 1 or rule 8 of Order XXX., and on a summons for judgment under Order XIV., the Master can, and in an action for the recovery of land generally does, order pleadings to be delivered between the parties. If the plaintiff has indorsed his writ for trial without pleadings under Order XVIIIA., the defendant can within ten days after appearance apply for a statement of claim. The Master on this summons may order a statement of claim or particulars to be delivered, or may order the case to go to trial without pleadings.

### *Pleadings.*

The rules as to pleadings in an action for the recovery of land differ in some respects from those which govern other actions. These differences are mainly due to the principle of the common law to which we have already referred, that the plaintiff in such an action must recover by the strength of his own title, and not by reason of any defect in the title of the person in possession. Hence as a general rule the plaintiff must set out in his statement of claim the steps by

[1] Order XIV., r. 10; and see *ante*, p. 436.
[2] *Daubuz* v. *Lavington* (1884), 13 Q. B. D. 347; *Hall* v. *Comfort* (1886), 18 Q. B. D. 11; *Kemp* v. *Lester*, [1896] 2 Q. B. 162.
[3] *Casey* v. *Hellyer* (1886), 17 Q. B. D. 97; *Jones* v. *Stone*, [1894] A. C. 122.

which the land has devolved on himself, showing each link in his title.[1] But the language of the title deeds need not be set out, unless the precise words are material.[2]

To this rule there are two exceptions:—

(i.) If the plaintiff was recently in possession, and has been ejected by the defendant, not by process of law, it is enough for him to plead these facts.[3]

(ii.) Where the defendant is estopped from denying the plaintiff's title, as, for instance, where the relation of landlord and tenant exists between them. A tenant is estopped from denying that his landlord who put him in possession of the land then had title so to do, or that his landlord from whom he has accepted a lease then had title to grant that lease, or that his landlord to whom he paid rent then had title to receive that rent.

The plaintiff may claim possession as the residuary devisee of a testator, and in the alternative, should the will for any reason be held invalid, as his heir-at-law. But in an action for recovery on a forfeiture of demised premises the plaintiff must be careful not to claim any rent which accrued due after the alleged forfeiture; for such a claim affirms the tenancy as still existing at that date.

The law deems anyone, who is in possession of land, to be its owner until the contrary be proved.[4] Hence in an action for the recovery of land the defendant is permitted to state merely that he is in possession, and thus to conceal all defects in his title.[5] This plea is accepted as a denial of every allegation of fact alleged in the statement of claim; moreover, under it the defendant may set up at the trial any legal defence, even the Statute of Limitations, without any notice to the plaintiff.[6] But to this rule there is one important exception. If the defence depends on an equitable estate or right, or if the defendant claims relief upon any equitable ground against any right or title asserted by the

[1] *Philipps* v. *Philipps* (1878), 4 Q. B. D. 127; *Davis* v. *James* (1884), 26 Ch. D. 778; and see Odgers on Pleading and Practice, 6th ed., pp. 122—129.
[2] Order XIX., r. 21; *Darbyshire* v. *Leigh*, [1896] 1 Q. B. 554.
[3] Cf. Praetor's interdict *Unde vi*, and the Assize of *Novel disseisin*.
[4] *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1.
[5] Order XXI., r. 21.
[6] In spite of rules 13, 15 and 17 of Order XIX.; see Odgers on Pleading and Practice, 6th ed., pp. 212, 213.

plaintiff, he must set out such estate, right or claim specially in his defence, and state explicitly the facts on which it is based. The defendant may also plead a counterclaim, *e.g.*, for relief against forfeiture,[1] or for specific performance of an agreement to grant him a lease or sell him the land.

The cases in which a tenant is entitled to claim relief against his landlord have been already described in the chapter on the action for the recovery of land.[2] A sub-lessee may in some cases be entitled to relief against forfeiture although his immediate lessor, the original tenant, is not.[3] A landlord may always waive a forfeiture, if he thinks fit; in some cases, indeed, a waiver will be presumed.[4] The issue and service of the writ to recover possession operates as a final election by the lessor to determine the lease, but the effect of the order for relief is to restore the lease as if it had never become forfeited.[5]

Hence the pleadings in an action for the recovery of land may be as follows:—

STATEMENT OF CLAIM.

1. On September 30th, 1904, Raymond Wilson purchased a farm known as "Manor Farm," and situate in the parish of Horsey, in the county of Norfolk, and the said farm was conveyed to him in fee simple on December 9th, 1904.

2. On March 25th, 1905, Raymond Wilson demised the said farm to the Defendant for the term of three years.

3. On July 4th, 1908, Raymond Wilson died.

4. The Plaintiff is the eldest surviving son of the late Joseph Wilson, who was the eldest brother of Raymond Wilson. He is the heir-at-law both of Joseph and Raymond Wilson. No letters of administration to the estate of Raymond Wilson have yet been granted.[6]

5. The Defendant has wrongfully retained possession of the said farm, although the term for which he held it has expired.

And the Plaintiff claims—

(i.) Possession of the said farm.

(ii.) £—— for mesne profits from July 4th, 1908, till possession is given up to the Plaintiff.

Delivered the 12th day of January, 1909, by, &c. (Signed) F. W.

DEFENCE AND COUNTERCLAIM.

*Defence.*

1. The Defendant is in possession of the farm mentioned in the Statement of Claim.

*Counterclaim.*

2. In the alternative, if the Plaintiff be the heir-in-law of Raymond Wilson, the Defendant says that before the expiration of the term granted to the Defendant on

[1] *Warden* v. *Sewell*, [1893] 2 Q. B. 254.
[2] *Ante*, p. 435.
[3] *Imray* v. *Oakshette*, [1897] 2 Q. B. 218.
[4] *Hepworth* v. *Pickles*, [1900] 1 Ch. 108; *In re Summerson*, [1900] 1 Ch. 112, n.
[5] *Dendy* v. *Evans*, [1910] 1 K. B. 263.
[6] See *ante*, p. 1248.

March 25th, 1905, Raymond Wilson, by a writing dated February 3rd, 1908, agreed to grant, and the Defendant, by a writing dated February 4th, 1908, agreed to accept, a lease of the said farm for a term of seven years from March 25th, 1908.

And the Defendant counterclaims to have the said agreement specifically performed, and to have a lease granted to him by the Plaintiff in accordance therewith.

(Signed) W. B.

Delivered the 22nd day of January, 1909, by, &c.

REPLY AND DEFENCE TO COUNTERCLAIM.

1. The Plaintiff joins issue with the Defendant upon his Defence.

2. And as to the Counterclaim, the Plaintiff denies that Raymond Wilson ever agreed as therein alleged.

3. There is no memorandum of any such agreement sufficient to satisfy the Statute of Frauds.

4. If Raymond Wilson ever agreed to grant the Defendant a lease of the said farm, which the Plaintiff denies, such agreement provided that the lease should contain a condition by which it would determine if the defendant became bankrupt. The Defendant was adjudicated a bankrupt on December 23rd, 1908.[1]

(Signed) F. W.

Delivered the 1st day of February, 1909, by, &c.

## *Discovery.*

Here again the procedure is governed by our fundamental rule that the plaintiff must recover by the strength of his own title, and not by the weakness of the defendant's title. The plaintiff therefore must produce to the defendant every title deed to which he has referred in his statement of claim, unless the defendant is his tenant, and so estopped from denying his title. The defendant on the other hand cannot be compelled to produce any title deed in his possession which relates exclusively to his own title.[2] If, however, any document be common to the case of both plaintiff and defendant, or if any document in the possession of one party tends to establish the title of his opponent, it must be produced.[3] Moreover, any document on which the defendant relies as supporting any equitable defence or claim for relief must be produced to the plaintiff.

[1] The defendant's bankruptcy affords a good defence to the counterclaim, because a Court of equity will not decree specific performance of an agreement to grant a lease in cases where it would be useless to do so. Here, if the Court ordered a lease to be granted, the plaintiff could at once forfeit it and re-enter by reason of the bankruptcy. And see s. 14 of the Conveyancing Act, 1881, *ante*, p. 435.

[2] *Egremont Burial Board* v. *Egremont Iron Ore Co.* (1880), 14 Ch. D. 158; *Morris* v. *Edwards* (1890), 15 App. Cas. 309.

[3] *Ind, Coope & Co.* v. *Emmerson* (1887), 12 App. Cas. 300.

For the same reason the defendant in an action for the recovery of land is allowed more freedom than the plaintiff in the matter of administering interrogatories. He is entitled to know the facts on which the plaintiff's title rests, and he may, therefore, administer to the plaintiff interrogatories as to the links through which he traces his pedigree, as to the dates of the births or deaths of his predecessors in title, &c. But he will not be allowed to inquire into the evidence by which the plaintiff will seek to prove those facts.[1] Interrogatories, however, (as well as discovery of documents) are limited to matters material to the issues in the action. Hence if the defendant be a tenant to the plaintiff, and therefore estopped from denying his landlord's title, he cannot administer interrogatories to upset that title. A defendant can also, if he wishes, interrogate as to his own case, and, as a rule, he should do so, if he claims equitable relief.

The plaintiff in an action for the recovery of land can always put his whole case as disclosed in his pleading to the defendant and compel him to admit so much of it as is within the defendant's own knowledge. He will not be deprived of his right merely because such discovery may have the effect of disclosing some part of the defendant's case. But he cannot compel the defendant to disclose any matter which relates exclusively to the defendant's own title.[2] He cannot administer interrogatories to the defendant if the answers might subject him to a forfeiture. Thus, a tenant cannot be interrogated as to whether he has not assigned or underlet the premises contrary to a covenant in his lease.[3] But he may be interrogated as to whether his term or other interest has not expired or been determined by a proper notice to quit.[4] And if the defendant seeks to retain possession on some equitable ground the plaintiff can interrogate him fully as to such equitable matter.

[1] *Flitcroft* v. *Fletcher* (1856), 11 Exch. 543.
[2] *Lyell* v. *Kennedy* (1883), 8 App. Cas. 217; *Miller* v. *Kirwan*, [1903] 2 Ir. R. 118.
[3] *Pye* v. *Butterfield* (1864), 5 B. & S. 829; *Earl of Mexborough* v. *Whitwood U.D.C* [1897] 2 Q. B. 111.
[4] Wigram on Discovery, 81.

*Trial.*

The procedure at the trial of an action for the recovery of land is practically the same as in any other action. Where the relation of landlord and tenant exists or has existed between the parties, the plaintiff, as a rule, need not prove his title at the trial. He must in the first place establish that the defendant accepted possession of the land from himself or some predecessor in title, and that the defendant has continued in possession as tenant to himself; the simplest proof of this fact is that the defendant has paid him rent. Next, the plaintiff must prove the terms on which the defendant entered; this is usually done by producing and proving the lease. Lastly, the plaintiff must show that under the terms of the tenancy he is now entitled to call upon the defendant to surrender possession of the premises. In other words, he must prove that the term of years for which the lease was granted has now expired by effluxion of time; or if the tenancy was from year to year only, that it has been duly determined by a notice to quit; or, thirdly, that the lease contains a proviso for re-entry in case the tenant breaks any covenant in it by him to be performed, and that the defendant has broken such a covenant and thereby forfeited his lease. The defendant may, however, as we have seen, apply for relief under the Conveyancing Acts of 1881 and 1892,[1] or under section 210 of the Common Law Procedure Act, 1852.[2] If, however, the relation of landlord and tenant does not exist between the parties, the plaintiff must prove his title strictly, for the law deems anyone, who is in possession of land, to be the owner of it until the contrary be proved. The plaintiff can only recover possession by "the strength of his own title, and not by the weakness of the defendant's" title.[3]

He must establish a good title in himself to the land

[1] 44 & 45 Vict. c. 41; 55 & 56 Vict. c. 13.
[2] 15 & 16 Vict. c. 76.
[3] *Per* Lee, C. J., in *Martin* v. *Strachan* (1743), 5 T. R. at p. 110, n.; and see *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1.

claimed;[1] he must show that he is either the freeholder, or a person claiming under the freeholder. But if he claims as heir-at-law of A., it will be sufficient for him to prove that A. was in possession, and that he is A.'s heir. If the defendant can show a good title in some third person, that will be a sufficient defence, although such third person has never agreed or consented to the defendant's being in possession. "The plaintiff must exhaust the possibility that there are other heirs, and give some negative evidence to show that there are no descendants entitled in preference to himself."[2] But this will not be rigidly enforced in cases where the plaintiff's claim dates back beyond living memory, and he has done all he could by advertisement, &c., to discover other descendants who have a better title than himself, and has failed to do so.[3]

If the plaintiff succeeds, judgment will be given in his favour bidding the sheriff place him in possession of the premises claimed on the writ. Such a judgment, however, will not give the plaintiff an indefeasible title good against all the world, but only a title good at date of writ against those defendants who were served with it. This is a possessory action only, and it is therefore still open to some third person to come forward and prove that he has a better title to possession of the land or to the rents and profits of it, and so oust the successful plaintiff.[4]

A judgment for the recovery of the possession of land is enforced by writ of possession. And where the defendant is by any judgment or order directed to deliver up possession of land, the person prosecuting such judgment may, without any order for that purpose, sue out a writ of possession on filing an affidavit showing due service of the judgment and that the same has not been obeyed.[5] The writ, after stating that by the said judgment A. B. recovered (or E. F. was

[1] *Philipps* v. *Philipps* (1878), 4 Q. B. D. 127; *Davis* v. *James* (1884), 26 Ch. D. 778.
[2] *Per* Bramwell, B., in *Greaves* v. *Greenwood* (1877), 2 Ex. D. at p. 291.
[3] See the same judgment, at p. 292.
[4] *Ib.*, at p. 291.
[5] Order XLII., r. 5; Order XLVII., rr. 1, 2.

ordered to deliver to A. B.) possession of land specified, commands the sheriff to "enter the same, and cause the said A. B. to have possession of the said land and premises with the appurtenances." A *fi. fa.* for the amount of the mesne profits and costs may be joined in the same writ.

## Chapter XX.

### TRIAL OF AN ACTION.

After a case has been entered for trial, its name appears, first in the week's list, then in the day's list; and now at last the day of the trial has arrived, for which both parties have been so long preparing, and they must attend the court with their counsel, solicitors, and witnesses, and be in readiness when the case is called on for trial.

If at this juncture the plaintiff appears, and the defendant does not appear, the plaintiff may proceed to prove his claim, so far as the burden of proof lies upon him, and obtain judgment in the defendant's absence; if the defendant has pleaded a counterclaim, the plaintiff is entitled to have that dismissed at once with costs. But if the defendant appears, and not the plaintiff, the defendant is entitled to judgment at once, dismissing the plaintiff's claim in the action; if he has a counterclaim he may prove his counterclaim as far as the burden of proof lies on him.[1] But any verdict or judgment, obtained where one party does not appear at the trial, may be set aside upon terms, if application be made within six days after the trial.[2]

If, however, both parties appear, it is possible for either party to take objection to the jury which has been summoned by the sheriff for the trial of the action. He may either challenge the array, *i.e.*, object to the whole panel collectively, or he may challenge the poll, *i.e.*, object to individual jurymen. But it very seldom happens in a civil case that a party takes either objection.

As soon as the jury has been sworn, the junior counsel for the plaintiff "opens the pleadings"—that is, he briefly states

[1] Order XXXVI., rr. 31, 32.
[2] Order XXXVI., r. 33.

their effect. But if the action is brought for unliquidated damages, he must not state the amount which the plaintiff claims. And in no case must he mention the fact that the defendant has paid money into court, or the amount paid in.[1]

Next may arise the question as to which side has the right to begin. In a civil case, this depends entirely on the pleadings. Whenever the plaintiff claims unliquidated damages, he has the right to begin, unless the defendant has expressly admitted that the plaintiff is *primâ facie* entitled to recover the full sum which he claims. If the damages claimed be liquidated, still, if the defendant has in his defence traversed any material allegation which is essential to the plaintiff's case, the plaintiff has the right to begin. If a single issue be on the plaintiff, it does not matter that there are others which lie on the defendant. But the defendant may have made admissions in his defence which entitle him to begin. This may have been done purposely, as it is generally an advantage to have the first word with the jury. Besides, if any evidence is called on the opposite side, the first word means the last word too; and to have the last word is always important. If both parties claim the right to begin, the judge will decide between them according to the pleadings as they stand.

If the plaintiff is entitled to begin, his leading counsel now "opens his case": that is, he states in chronological order the facts on which the plaintiff relies; he sometimes also deals with the defences pleaded, discounting them in anticipation. He must not open any fact which he is not prepared with evidence to prove. The junior counsel for the plaintiff then calls the first witness, who is generally the plaintiff himself, and examines him "in chief," as it is called; he is cross-examined by the defendant's counsel,[2] and re-examined by the leading counsel for the plaintiff, who then calls the next witness. And so the case proceeds, the two counsel taking the witnesses for the plaintiff, as a rule, alternately. The judge decides as to the admissibility of any evidence, and disallows all

[1] Order XXII., r. 22.

[2] But if a witness be only called to produce a document, and is not sworn or asked any question in chief, the other side has no right to cross-examine him.

improper questions; he often himself puts questions to the witness when counsel have finished with him. But the judge has no right to call a witness himself if either party objects, for a judge has nothing to do with the getting up of a case.[1]

When all the plaintiff's witnesses have been examined, and all documents material to his case have been put in and read, the plaintiff's case is closed. If the defendant's counsel intimates that he does not intend to call any witnesses, the plaintiff's counsel will at once address the jury, summing up his own evidence, and commenting on the defence, so far as it has been foreshadowed by the cross-examination, and also no doubt on the fact that the defendant does not venture to go into the box; the defendant's counsel then addresses the jury, criticising the evidence for the plaintiff. If, however, the defendant's counsel intends to call witnesses, or if he has already put in any document, he addresses the jury at the conclusion of the plaintiff's case, opening the defence. He then calls his witnesses, each of whom may be examined, cross-examined, and re-examined, and he usually makes a second speech for the defendant, at the conclusion of which the leading counsel for the plaintiff replies on the whole case. This disadvantage necessarily attends calling witnesses for the defendant; it gives the plaintiff the last word with the jury; and in a doubtful case this may determine the result of the action. But, on the other hand, the jury like to see the defendant in the box, and to learn from his own lips his reasons for his conduct.

In some cases, at the close of the defendant's case, the plaintiff is allowed to call further evidence in answer to any affirmative case raised by the defendant; but not if he has given any evidence on this issue in the first instance; he will not be permitted to divide his proof.

The rules of evidence are in the main identical in civil and criminal cases.[2] So, too, are the rules as to the examination

[1] *In re Enoch and Zaretsky, Bock & Co.*, [1910] 1 K. B. 327.
[2] See *ante*, p. 1073.

of witnesses in chief, and their cross-examination and re-examination.[1] But there are some particulars in which they differ, of which the following are the most important. In civil proceedings, the husband or wife of either party can give evidence for or against that party. An admission induced by threats or promises is admissible for what it may be worth, but a dying declaration is not admissible. Stamp objections can be taken in civil, though not in criminal, cases. Leave to take evidence on commission or under letters of request will be readily granted in civil cases. The rules as to evidence of a party's good or bad character differ considerably from those which are in force in criminal proceedings.[2]

It sometimes happens, however, that before the evidence on both sides has been concluded, the proceedings are cut short either by a compromise or by the decision of some point of law. During the progress of the trial it may become clear to both parties that it would be wiser for them to settle the matter amicably than to fight it out in open court, hence they endeavour to arrange a compromise. If they succeed in coming to terms, a juror is—theoretically, at all events—withdrawn from the jury box and the action is at an end. The counsel for each party has full authority to make such a compromise, unless expressly forbidden to do so by his client at the time,[3] provided the compromise does not include or affect matters outside the scope of the action.[4] The terms of such a compromise will be strictly enforced, if necessary, by an order of the Court.

It is the duty of the judge to decide all questions of law which arise during the course of the trial. At the close of the evidence for the plaintiff the defendant's counsel sometimes submits as a matter of law that no case whatever has been made out against his client, and asks the judge to withdraw the case from the jury and direct judgment to be entered for the defendant without any verdict. But most

[1] See *ante*, pp. 1064—1066.
[2] See Powell on Evidence, 9th ed., p. 134, and *ante*, pp. 1082, 1083.
[3] *Neale* v. *Gordon Lennox*, [1902] A. C. 465
[4] *Kempshall* v. *Holland* (1895), 14 R. 336.

judges decline to allow the question to be argued at this stage of the action, unless the defendant's counsel at once announces that he intends to call no witnesses. If he intends to call witnesses, the point is generally reserved till after all the evidence on both sides has been given. Every point of law on which either party intends to rely must, as a rule, be raised before verdict; if it is not raised at the proper time, the party will be deemed to have waived it, and will not be entitled to raise it on appeal,[1] though the Court may, of its own motion, take a point of law which neither party wishes to raise.[2] The judge at the trial has full power to allow either party to alter or amend the indorsement on the writ or any pleading or proceeding on such terms as may be just,[3] and to add, or strike out, or substitute, a plaintiff or defendant.[4]

As soon as all the evidence has been heard, and the counsel on both sides have addressed the jury, the judge sums up the evidence. If there be no evidence to go to the jury on any issue, he should withdraw that issue from the jury and rule against the party on whom the burden of proving that issue lay. If, however, there be conflicting evidence, on which the jury might reasonably find a verdict either way, he must not stop the case; he must leave the issue to the jury. He may, if he thinks fit, state to them his opinion on the matter. But the jury is not bound to adopt his lordship's view as to any question of fact. They are bound to accept the law as laid down by him, but it is for them to determine the issues of fact according to their own opinion of the evidence given before them, even though it may be contrary to the opinion which the judge has just expressed.

The judge may either leave the jury to return a general verdict for the plaintiff or for the defendant, or ask them to answer certain specific questions; in the latter case it will be for the judge to determine subsequently what is the legal result of their findings. If either party desires that any

[1] See *post*, p. 1325.
[2] *Luckett* v. *Wood* (1908), 24 Times L. R. 617; and see *Connolly* v. *Consumers' Cordage Co.* (1903), 89 L. T. 347.
[3] Order XXVIII., rr. 1, 6, 12.
[4] Order XVI., r. 12.

other question should be left to the jury besides those which the judge is proposing to leave, he should ask the judge to put that question also to the jury before the verdict is given.[1]

The jury now consider their verdict. They must determine all issues of fact. In a civil case it is not necessary, as it is in a criminal prosecution, for either party to establish any fact beyond all reasonable doubt; a preponderance of probability will be sufficient; and, except in the case of breach of promise of marriage,[2] corroboration is never absolutely required in civil cases, though, of course, the fact that corroborative evidence could have been easily obtained and is not produced will be a most important point for the jury to consider.

If the jury are in favour of the plaintiff, or for the defendant on a counterclaim, they must also assess the damages. In arriving at the amount, the jury must not have regard to any question of costs; that is a matter for the judge. And they must not be informed that any money has been paid into court.[3] Where the plaintiff's demand is liquidated, the jury determine the amount to which he is entitled by mere arithmetic, or according to a scale of charges or some other accepted rate or percentage. Where, however, the damages are unliquidated, the jury have a freer hand: they may give the plaintiff either "contemptuous," "nominal," or "substantial" damages; in some cases they may award "vindictive" damages. "The assessment of damages is peculiarly the province of the jury."[4] But the law lays down certain rules to guide them in this duty, and also defines what matters they may and what matters they may not take into their consideration in so doing. The principles which govern the assessment of damages and determine the "measure of damages," as it is called, are discussed in the next chapter.

Where the cause of action is continuing (as in cases of nuisance, non-repair, or continuing trespass), the jury must

[1] *Weiser* v. *Segar*, [1904] W. N. 93.
[2] Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 2.
[3] Order XXII., r. 22.
[4] *Per cur.* in *Davis* v. *Shepstone* (1886), 11 App. Cas. at p. 191.

assess the damages down to the time of assessment;[1] and the plaintiff can bring a second action for any subsequent damage, if it continues. But where the cause of action consists of one isolated act or omission (*e.g.*, one assault, one libel, or one piece of negligence), the jury must assess the damages once for all. No fresh action can as a rule be brought for any subsequent damage; hence, the jury must now take into their consideration every loss which will naturally result in the future from the defendant's conduct, though they must not speculate on mere contingencies.[2]

As soon as the verdict has been returned, the counsel for the successful party asks for judgment. Sometimes, if there are important legal questions raised, the judge does not give judgment at once, but reserves the matter for "further consideration." This is really a motion for judgment, and it must be heard and determined, if possible, by the judge who tried the case.[3] As a rule, however, the judge gives judgment then and there, according to the findings of the jury. If they have awarded the plaintiff damages, judgment will be given for the plaintiff for the amount so awarded—unless, indeed, the defendant had the foresight to pay at least that amount into court, in which case judgment will be given for the defendant, and the judge may order the difference, if any, to be paid out of court to him.[4] If, however, the sum paid into court be less than the amount of the verdict, the judge will order that sum to be paid out of court to the plaintiff. If the jury find a verdict for a larger amount than that claimed on the writ, judgment cannot be given for that larger amount without an amendment of the record. The

[1] In an action, however, for the recovery of land the plaintiff may claim mesne profits from the date of the defendant's entry till possession of the premises be re-delivered to the plaintiff (*Southport Tramways Co.* v. *Gandy*, [1897] 2 Q. B. 66). And in an action of detinue the jury may give damages for the wrongful detention until the property detained be restored to the plaintiff (*per* Bowen, L. J., in *Serrao* v. *Noel* (1885), 15 Q. B. D. at p. 559).

[2] *Lambkin* v. *S. E. Ry. Co.* (1880), 5 App. Cas. 352; *Tunnicliffe, &c., Ltd.* v. *West Leigh Colliery Co.*, [1906] 2 Ch. 22; [1908] A. C. 27; *George D. Emery Co.* v. *Wells*, [1906] A. C. at p. 525.

[3] Judicature Act, 1890 (53 & 54 Vict. c. 44), s. 2.

[4] *Gray* v. *Bartholomew*, [1895] 1 Q. B. 209. There is one exception to this, viz. where the defendant has paid money into court with a plea under Lord Campbell's Libel Act, 1843, and has failed to prove the rest of his plea: *Dunn* v. *Devon Newspaper Co.*, [1895] 1 Q. B. 211, n.; *Oxley* v. *Wilkes*, [1898] 2 Q. B. 56.

judge, however, has power to make such amendment if he think fit.[1] If a counterclaim has been pleaded and the plaintiff has recovered so much on his claim, and the defendant so much on his counterclaim, only one judgment will, as a rule, be given; that will be in favour of the party who has recovered the larger amount, and merely for the balance of it after deducting the lesser amount from it.[2]

A trial by a judge alone or before an official or a special referee is conducted in the same manner, as nearly as circumstances will admit, as if before a judge and jury; but the ceremony of opening the pleadings is generally omitted.

*Costs.*

Now frequently follows a discussion as to the costs of the action. The right of the successful party to be compensated by his opponent for the expense to which he has been put by the litigation now depends on two questions:—

Was the action tried by a judge with a jury, or by a judge alone?

Was the action of such a kind that it could have been commenced in the county court?

If the action be tried by a judge alone, he has full power to deal with the costs as in his discretion he deems right; but he must exercise his discretion judicially. He generally deals expressly with the costs in his judgment. If he does not, the counsel for the successful party should ask for them.

If, however, the action be tried by a judge with a jury, the right of the successful party to his costs will largely depend on whether the action could or could not have been tried in the county court. If the action was brought for breach of promise of marriage, libel, slander, or seduction, or for any other reason was of such a kind that it could not be commenced in the county court,[3] a verdict for any amount, however small, will carry costs, unless the judge before whom such action is tried, or the Court, "shall for good cause otherwise order."[4] Hence, however small the verdict in the plaintiff's favour may be, his counsel need not ask for costs; the plaintiff will have the general costs of the action, if nothing be said.[5] It is for the defendant's counsel in such a case to apply to the judge, as soon as the

[1] Order XXVIII., r. 1; *Beckett* v. *Beckett*, [1901] P. 85.
[2] Order XXI., r. 17.
[3] See *ante*, pp. 1022—1025.
[4] Order LXV., r. 1.
[5] There is an exception to this rule. By section 1 of the Slander of Women Act, 1891 (54 & 55 Vict. c. 51), in any action for words spoken and made actionable by that Act, "a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action." Hence, in this case it is necessary for the plaintiff's counsel to ask for a certificate, unless the verdict is so large that it clearly exceeds the amount at which the costs of the action will be taxed.

verdict is given, for an order depriving the plaintiff of his costs. As a rule, such an order will only be made where "contemptuous" damages, such as a farthing or a shilling, have been given, and not always then. There must be some "good cause," besides the smallness of the damages, to give the judge jurisdiction to make such an order; something either in the conduct of the parties or in the facts of the case which, in spite of the finding of the jury, makes it more just that the costs should not follow the event.[1] A successful defendant may also be deprived of his costs if there be good cause. But he cannot be made to pay the whole costs of the action under any circumstances.

But if the action be of a class which can be commenced in a county court, the provisions of the County Courts Acts [2] apply, and a verdict for a small amount will not carry costs. If the action was founded on contract, and the plaintiff recovers less than £20, he will be entitled to no costs whatever; if he recovers £20 or more but less than £100, he will be entitled to county court costs only; if he recovers exactly £100, he will be entitled to county court costs only, unless in each case a judge of the High Court certifies that there was sufficient reason for bringing the action in that court, or makes a special order as to costs. If the action was founded on tort, and the plaintiff recovers less than £10, he will be entitled to no costs whatever; if he recovers £10 or more, but less than £20, he will be entitled to county court costs only—unless a judge of the High Court certifies that there was sufficient reason for bringing the action in that court, or makes a special order as to costs. In both cases, therefore, it is the duty of the plaintiff's counsel to apply to the judge for such a certificate or special order before judgment is entered. And such special order as to costs can only be made "for good cause," if the action has been tried by a judge and jury.

And generally, whatever the nature of the action may be, it may be necessary for counsel before judgment is entered to ask for any special costs, such as the costs of a special jury, of a commission to take evidence abroad, of photographic copies of any document, or any costs reserved to be disposed of at the trial. The party who has incurred these costs will have to bear them, unless the judge at the trial makes an order for their allowance on taxation. Counsel for the unsuccessful party, if he thinks of appealing, should also, at this stage, ask for a stay of execution; for an appeal does not operate as a stay of execution or of proceedings under the decision appealed from, except so far as may be ordered, and no intermediate act or proceeding will be invalidated, except so far as the Court appealed from may direct.[3] Stay of execution is generally granted, if at all, on the terms that a sum of money be brought into court and notice of appeal given within so many days.

[1] *Jones* v. *Curling* (1884), 13 Q. B. D. 262. Further, as to what is "good cause," see Odgers on Pleading and Practice, 6th ed., pp. 343—348.

[2] County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 116, as amended by County Courts Act, 1903 (3 Edw. VII. c. 42), s. 3.

[3] Order LVIII., r. 16.

## Chapter XXI.

### Damages and the Measure of Damages.

### I. General Principles.

"The assessment of damages is peculiarly the province of the jury."[1] But the law lays down certain rules to guide them in this duty, and also defines what matters they may and what matters they may not take into their consideration in so doing.

The first great principle is, of course, "that a plaintiff is entitled to recover by way of damages all that at the commencement of the suit he has lost through the wrongful act for which the defendant is sued."[2] Nor is the plaintiff always limited to what he has lost at the commencement of the suit; he can in some cases recover for future loss which it is clear he must sustain, though not for any speculative or problematical loss which he may or may not incur. In such cases the "plaintiff must recover once for all, by one and the same action, all damage, past, present and future, resulting from one and the same cause of action."[3] The plaintiff is entitled to be placed in the same position as if the contract had not been broken or the tort had never been committed. But this principle is at once qualified and restricted by a second rule, that a defendant is not liable to compensate the plaintiff for any damage which he did not in fact contemplate, or which he could not be expected as a reasonable man to contemplate, at the time when he did the act. Such damage is said to be too remote to be taken into consideration by a jury, for it is not the direct result of the defendant's conduct.

In certain cases, however, other matters may be taken into

[1] *Per cur.* in *Davis* v. *Shepstone* (1886), 11 App. Cas. at p. 191.
[2] *Per* Lord Denman, C. J., in *Rundle* v. *Little* (1844), 6 Q. B. at p. 178.
[3] *Per* Manisty, J., in *Lamb* v. *Walker* (1878), 3 Q. B. D. at p. 395; but see *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127, and *post*, pp. 1315, 1316.

consideration in assessing the amount of damages to be awarded. Surrounding circumstances, such as the relation between the parties, spite or ill-will, the unfeeling conduct of the defendant, are allowed to weigh with the jury. In such cases, "damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."[1]

The leading rules which now govern damages in England may be stated thus:—

1. In certain actions, such as libel, slander, seduction, and breach of promise of marriage, the jury is permitted to award vindictive damages in excess of the amount which would adequately compensate the plaintiff for all injury inflicted.[2]

2. In all other actions the damages are limited to the loss which the plaintiff has actually sustained. Indeed, it often happens that the jury is not permitted to award the successful plaintiff full compensation for the whole of such loss. They may only compensate him for—

(i.) Any damage which is the natural or the probable consequence of an act such as that done by the defendant, whether the defendant contemplated such a consequence or not.

(ii.) Any damage which the defendant did in fact contemplate—

(*a*) at the time when he entered into the contract as a natural or probable consequence of a breach of that contract;

(*b*) at the time when he committed the tort as a natural or probable consequence of such tort.

(iii.) Any damage which is the probable result of the defendant's act, provided that whenever the probability of such a result ensuing depends upon the special circumstances of the particular case, the defendant will not be liable to

[1] *Per* Pratt, C. J., in *Wilkes* v. *Wood* (1763), 19 St. Tr. at p. 1167.
[2] See *post*, pp. 1281, 1310.

compensate the plaintiff for such result, unless he had notice of such special circumstances at the time of his (*a*) making the contract, (*b*) committing the tort.

3. All other damage which the plaintiff may have sustained the judge will exclude from the consideration of the jury as being too remote.

By "natural consequence" is meant such a result as must follow from the defendant's act in the ordinary course of nature, in short, a consequence which is physically necessary. By "probable consequence" is meant such a consequence as, human nature being what it is, usually follows from such an act as the defendant's, or so frequently follows that a person of ordinary intelligence and foresight would reasonably anticipate such a result, if he thought about the matter at all.[1]

At first sight it seems strange that a jury should be allowed to award a plaintiff compensation in excess of any damage which he has actually sustained, still more so that a jury should be directed to do this "as a punishment to the guilty" and "to deter from any such proceeding for the future."[2] By permitting this, is not our law employing a civil action to do the work of an indictment? It is the object of criminal, not civil, proceedings to punish the offender, and to prevent any repetition of the offence. From time to time, indeed, very various principles of assessing damages have been adopted, and it may be questioned whether we have yet attained in England to any very logical principle, or to any completely satisfactory rule.

At first, no doubt, a civil action was but a substitute for private vengeance. The law no longer permitted the person injured to redress his grievance himself: the law took upon itself to determine the amount of compensation which the plaintiff should receive; but it was for that very reason careful to give him about as much as he would have exacted himself if he had been allowed a free hand. Take, for instance, the action for theft at Rome. If the thief was caught in the act, or on the spot (*fur manifestus*), the owner of the thing stolen might, under the early law of the XII. Tables, scourge the thief; and if he were a freeman, might sell

[1] It is submitted that, if these words are thus restricted, the paragraphs numbered (i.), (ii.), (iii.) above correctly state what is left of the three rules in *Hadley* v. *Baxendale* (1854), 9 Exch. 341, after the minute criticism which they have received in the judgments in many subsequent cases, and notably in *The British Columbia Saw Mill Co.* v. *Nettleship* (1868), L. R. 3 C. P. 499; *Horne* v. *Midland Ry. Co.* (1873), L. R. 8 C. P. 131, 137; *Baxendale* v. *L. C. & D. Ry. Co.* (1874), L. R. 10 Ex. 35; *Sanders* v. *Stuart* (1876), 1 C. P. D. 326; *Hydraulic, &c., Co.* v. *McHaffie* (1878), 4 Q. B. D. 670; *Grébert-Borgnis* v. *Nugent* (1885), 15 Q. B. D. 85; *Hammond* v. *Bussey* (1887), 20 Q. B. D. 79; and *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640.

[2] See the language of Pratt, C. J., cited on last page.

him as a slave; or if he were a slave, might kill him. But before the time of Gaius it was felt that such a punishment was too severe; and the prætor's edict established that the thief must return the property to the owner, and also pay him four times its value. But if the thief was not taken in the act, or on the spot, then the XII. Tables enacted that he must return the thing which he had stolen, and pay the owner in addition twice its value. In either case the penalty imposed was far in excess of the loss which the plaintiff had actually sustained, so that it was a benefit pecuniarily to an ancient Roman to have his chattels purloined. Note also the distinction between the penalties paid by the manifest and the non-manifest thief. Both these incidents show clearly that the measure of damages was fixed solely with a regard to the feelings which might be expected to actuate an owner of property who was wreaking his vengeance on a detected thief.[1]

Traces of the same policy linger in our own land laws. A tenant who does not deliver up possession of his holding in obedience to a notice to quit must, by the statute 11 Geo. II. c. 19, s. 18, pay his landlord double rent; if he holds over after the expiration of his term, he must, under the statute 4 Geo. II. c. 28, s. 1, pay his landlord double the value of his holding. Then, again, by s. 209 of the Common Law Procedure Act, 1852, a tenant who does not "forthwith" inform his landlord that he has been served with a writ in ejectment forfeits three years' rent. And it would seem that the tenant must pay this arbitrary sum even though his landlord had already had notice from the plaintiff's solicitors that such an action was threatened. So, under the statute 2 Will. & Mary, sess. 1, c. 5, ss. 3, 4, he who breaks a pound and rescues goods therefrom must pay treble damages and treble costs, without proof of any special damage suffered by the plaintiff;[2] and yet it has been held that such a proceeding is not a penal action![3] In all these cases it is clear that our law has regard mainly, if not solely, to the injured feelings of the plaintiff; and makes no attempt to accurately assess the damage which the defendant's act has really caused.

Then, as society advanced, men began to see that this was not quite fair to the defendant; and the next stage, apparently, was to let the parties, if they would, assess the damages beforehand, and settle what would be the proper sum to be paid in each event. This sounds fairer, no doubt, because each party has a voice in the matter. But in most cases the apparent fairness of this method is illusory. Borrower and lender are not really on equal terms; nor sometimes are landlord and tenant. If a tenant is really anxious to take a particular farm, he will often sign a lease containing the most stringent conditions, and agree to pay £1,000 as liquidated damages in case he breaks any one of them. And in former days he would have been compelled to pay the £1,000, though the loss resulting from his breach to the landlord was less than half a crown. So, too, under the

[1] This is, indeed, expressly admitted by Justinian: Inst. iv. 4, 7.
[2] *Kemp* v. *Christmas* (1898), 79 L. T. 233.
[3] *Castleman* v. *Hicks* (1842), 2 Moo. & R. 422.

Tudors and the Stuarts, it was the regular and customary thing for a man who was borrowing £500 for six months solemnly to enter into a bond under seal for £1,000. And if he failed to pay back the £500 on the last day of the six months, he was liable to pay the full £1,000. It was not regarded as at all extortionate for the creditor to insist on cent. per cent. if his debtor was one day behindhand in paying the debt. And this remained the law till the days of Queen Anne (4 & 5 Anne, c. 16); for the borrower, it was urged, had expressly agreed to those terms. But now the tendency is to go to the opposite extreme ; our law, or rather our legislature, is almost too prone to allow persons in default to slip out of their contracts.

Next, moral considerations intervened. In some cases, it was felt the plaintiff had a right to be angry, and to exact the uttermost farthing ; but in others, *e.g.*, where the injury was done unintentionally, he ought to be reasonable and moderate his indignation. And so the practice arose of not looking solely at the plaintiff's injured feelings, but of considering also the defendant's conduct in the matter. If he had acted wantonly, callously or brutally, he ought, it was thought, to pay the plaintiff more damages than if he had behaved like a gentleman, although in both cases the actual pecuniary loss sustained by the plaintiff would be identical. In other words, the damages are to be meted out according to the feeling of annoyance and indignation which a reasonable plaintiff would properly feel at being so treated. We still have such considerations urged on a jury in actions for breach of promise of marriage. The plaintiff has lost a marriage which was worth, say, £1,000 to her. If the defendant acted with proper feeling and decorum when he broke off the engagement, the jury would find a verdict for just the £1,000. If, however, he acted harshly and selfishly, with no regard to the girl's feelings, he may have to pay £1,200. If, again, he is foolish enough to make any imputation on the lady's character which he fails to prove, then the damages will probably rise to £2,000. In other words, the lady benefits pecuniarily because the man to whom she was once engaged is a brute, whereas she ought really to receive less compensation for such a happy escape.

So, too, a plaintiff who has been induced to enter into a contract by means of a deliberate fraudulent misstatement generally recovers more damages than he would if the misrepresentation was made innocently, although the injury done to him is the same in either case. In the latter case, as a rule, he can only get the contract rescinded. A similar instance is cited in the Digest. If Titius let pasture land on which grew poisonous or injurious herbs, and his tenant's cows ate the herbs and died in consequence, then, if Titius did not know such herbs were there, he was bound merely to remit the rent ; but if he did know it, he had to pay in addition the value of the cows and all other damage which his tenant had sustained (D. 19, 2, 19, 1). By the law of England, it is conceived, no action would lie in either case unless there was some express warranty. But we have a precisely similar rule in cases of underground trespass into the coal mine of an adjoining owner. There the measure of damages is the actual value at the pit's mouth of the coal wrongfully abstracted, after deducting, in

the case of accidental trespass, the cost of severance and "bringing to bank," but in the case of deliberate trespass the cost of bringing to bank only, nothing being allowed for "getting" the coal;[1] yet the plaintiff's loss is the same whether the trespass was deliberate or accidental. Why should he benefit because the defendant intended to do wrong? In many classes of action besides those already mentioned (*e.g.*, libel, slander, false imprisonment, malicious prosecution, seduction, etc.) the plaintiff is allowed to recover additional damages, over and above his real loss, because the defendant acted recklessly, dishonestly, or maliciously; and this will always be the case so long as damages are assessed by a jury.

Now let us leave out of account all these cases in which vindictive damages may be awarded, and confine our attention to the unimpassioned inquiry: By what principles should the jury be guided in assessing the loss which the plaintiff has, in fact, sustained as the result of the defendant's act? In cases of injury to the person or to the reputation of the plaintiff, there is often no pecuniary loss at all; yet it is clearly right that the defendant should recompense the plaintiff for the insult, the indignity, and the pain caused by a gross libel or a public assault, or by being marched through the streets in custody. In all such cases the jury may compensate the plaintiff for injured feelings and for injured pride; for this is clearly part of the damage. But in actions for breach of contract, or for injury to property, our law is much more niggardly, and seldom allows a plaintiff a full recompense for his loss. Consequential damage, though in fact sustained, is frequently excluded as remote. Thus, if a man promises to lend me a certain sum of money on a certain day, and I make all my arrangements, relying on that promise, I can recover only nominal damages at the most, if he breaks his word, though the injury to my credit be enormous, and my actual pecuniary loss considerable.[2]

And even in assessing the actual value of the property injured or not delivered, the law too strictly adheres to the principle of market value. If a man breaks in pieces a gold watch which the Duke of Wellington gave to my grandfather, is he to pay me merely the second-hand price of any other similar old watch? Am I to be allowed nothing for the special value which I attached to that watch because of its history and associations? It does not matter to me whether the defendant knew its history or not; I did, and I have lost it. I would not have sold it for £100. Can I claim, therefore, that the market value of that particular watch is £100? The judge would probably call that "a fancy value," and allow the history of the watch to affect the damages only so far as experts called before him could swear that it would have enhanced the selling price of the watch at an auction. On the other hand, in some

[1] *Martin* v. *Porter* (1839), 5 M. & W. 351; *Ecclesiastical Commissioners* v. *N.E. Ry. Co.* (1877), 4 Ch. D. 845; and see *Phillips* v. *Homfray*, [1892] 1 Ch. 465.

[2] See the remarks of Jessel, M. R., in *Wallis* v. *Smith* (1882), 21 Ch. D. at p. 257, and *post*, p. 1297.

cases the plaintiff may be able to replace more cheaply than anyone else the goods which have been destroyed through the negligence or misconduct of the defendant; it may be his trade to manufacture such goods. Nevertheless, our law declares that the measure of damages in such a case is not the sum which it would cost the plaintiff to manufacture other similar goods in the place of those destroyed, but the price for which the plaintiff could have sold the goods in the retail market on the day on which they were destroyed.[1]

Yet, of course, there are cases in which special circumstances are allowed to increase the value of the article removed or injured. That article may have a special value as being one of a set, and the value of the set as a whole may be reduced by much more than the market price of the one article, *e.g.*, one volume out of a complete edition; one dish out of a Dresden dinner service; one horse out of a pair used to running in harness together. In each of these cases the defendant must pay for the diminished value of the complete set or pair. This was so also in Rome.[2] So, too, a trespasser in A.'s coal mine will be liable not only for the coal which he has removed, but also for the coal which he has rendered less valuable by his unskilful working.[3] But we do not go so far as did the later Roman law in allowing the plaintiff, in addition to the market value of his property, compensation for everything which he has lost through the act of the defendant. With us the plaintiff is not entitled to be replaced at the expense of the defendant in precisely the same position as he would have occupied if no tort or breach of contract had occurred; in other words, he cannot recover his whole interest in the thing injured or destroyed.

On the other hand, it may be the case that the plaintiff attached no special value to the thing; as in *Armory* v. *Delamirie*,[4] he may not know its value; while the possession of it may be of the greatest importance to the defendant. A letter in the plaintiff's possession may be of enormous value to the defendant as a link in his chain of evidence in some lawsuit. Or the plaintiff may own a rare coin, or a valuable china vase, which the defendant desires for his collection to complete his set. He may have wrongfully taken possession of a little triangle of the plaintiff's land running up into his, the ownership of which would save him some 400 yards of fencing. Or, again, it may be a matter of the greatest pecuniary importance to the defendant to reach London in five hours; he therefore takes the plaintiff's horse and rides it to death. On what principle should the damages be assessed in such cases as these, at the figure for which the plaintiff might have been willing to sell or at the figure which the defendant in his urgency might have been willing to pay?

In most cases the law would reply, "At neither of those figures, but at the fair market value of the thing taken." There are cases, however, in

[1] *Holden* v. *Bostock* (1902), 50 W. R. 323.
[2] Lex Aquilia, 22, § 1.
[3] *Williams* v. *Raggett* (1877), 46 L. J. Ch. 849.
[4] (1722), 1 Smith L. C., 11th ed., 356.

which our law does take into consideration the fact that for some special reason the property in question is of more value to the defendant than it is to the plaintiff, and compels him to pay that higher value. Thus, where the defendants openly and with the knowledge of the plaintiffs trespassed on the plaintiffs' land by tipping on to it spoil from their colliery, it was held in the Court of Appeal that the value of the land for the purposes for which it was actually used by the defendants ought to be taken into consideration in assessing the damages as to so much of the land as was, in fact, covered with spoil, and that as to the rest of the land the measure of damages was the diminution in its value to the plaintiffs by reason of the wrongful acts of the defendants.[1]

## II. Different Kinds of Damages.

Damages are either liquidated or unliquidated. Whenever the amount to which the plaintiff is entitled can be ascertained by calculation or fixed by any scale of charges or any other positive data, it is said to be liquidated or "made clear." But when the amount to be recovered depends on all the circumstances of the case and on the conduct of the parties, and is fixed by opinion or by an estimate, the damages are said to be unliquidated.

Thus in an action on a bill of exchange or a promissory note the amount of the verdict, if it be for the plaintiff at all, can be reckoned beforehand. But in an action of libel it is open to the jury to award the plaintiff a farthing, or forty shillings, or a hundred pounds; and no one can say beforehand what the precise figure will be.[2]

As a general rule, the damages in an action of tort are unliquidated; in an action of contract they may be either liquidated or unliquidated. Thus in an action for breach of a covenant to repair the damages are necessarily unliquidated, as opinions will differ very widely as to the amount necessary to replace the premises in good repair. Again, although an action for wrongful dismissal is an action for breach of contract, nevertheless the amount of damages depends upon all the circumstances of the case, and especially upon the probability of the plaintiff obtaining another situation equally remunerative; "the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial."[3]

[1] *Whitwham* v. *Westminster, &c., Co.*, [1896] 1 Ch. 894; 2 Ch. 538. And see the wayleave cases, *Jegon* v. *Vivian* (1871), L. R. 6 Ch. 742, and *Phillips* v. *Homfray*, *ib.* 770.

[2] This distinction has been already noticed, *ante*, p. 1191.

[3] *Per cur.* in *Hochster* v. *De la Tour* (1853), 2 E. & B. at p. 691; *Unwin* v. *Clarke* (1866), L. R. 1 Q. B. 417, 421; *Tyers* v. *Rosedale, &c., Iron Co.* (1875), L. R. 10 Ex. 195, 199; *Synge* v. *Synge*, [1894] 1 Q. B. 466.

In many cases, as we have seen,[1] the plaintiff in an action of contract is entitled to interest under an agreement express or implied, and such interest would be liquidated damages; but in addition to the cases in which interest is payable at common law, interest may also be claimed as damages under section 28 of the statute 3 & 4 Will. IV. c. 42, which enacts that "upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment, provided that interest shall be payable in all cases in which it is now payable by law."[2] Similarly by section 29 the jury is entitled to give damages in the nature of interest, over and above the money recoverable in all actions on policies of insurance made after the passing of the Act. Interest when awarded under this statute is regarded as unliquidated damages.

In actions where the damages are unliquidated, it is peculiarly the province of the jury to assess the damages; and the Court of Appeal will not grant a new trial on the ground that the amount awarded is insufficient or excessive, unless it is satisfied that the jury either have made an improper compromise, disregarding the real merits of the case, or have proceeded upon a wrong principle in making their assessment, as if they have omitted to take into their consideration some of the elements of damage or have taken into consideration matters which they should have disregarded.[3] In all other cases, the Court will not disturb the verdict, unless it be such as no reasonable men could honestly have found.[4]

In actions where the damages are unliquidated, if we regard only the amount of the verdict, we naturally divide damages into four classes:—

(i.) Contemptuous.

(ii.) Nominal.

[1] *Ante*, p. 1139.

[2] See *Macbeth* v. *Maritime Insurance Co.* (1908), 24 Times L. R. 559.

[3] *Falvey* v. *Stanford* (1874), L. R. 10 Q. B. 54; *Phillips* v. *S. W. Ry. Co.* (1879), 5 Q. B. D. 78; *Johnston* v. *G. W. Ry. Co.*, [1904] 2 K. B. 250.

[4] *Webster* v. *Friedeberg* (1886), 17 Q. B. D. 736; *Metropolitan Ry. Co.* v. *Wright* (1886), 11 App. Cas. 152; *Davis* v. *Shepstone* (1886), 11 App. Cas. 187, 191; *Praed* v. *Graham* (1889), 24 Q. B. D. 53.

(iii.) Substantial.

(iv.) Vindictive (or exemplary or retributory).

And a plaintiff will be wise to consider which kind of damages he is likely to recover, before he incurs the anxiety and expense of litigation and risks the chance of defeat with the probable penalty of costs.

(i.) Contemptuous damages are awarded when the jury consider that the action should never have been brought. The defendant may have just overstepped the line, but the plaintiff is also somewhat to blame in the matter, or has rushed into litigation unnecessarily ; so he only recovers a farthing or a shilling.[1]

(ii.) Nominal damages are awarded where the action was a proper one to bring, but the plaintiff has not suffered any special damage, and does not desire to put money into his pocket ; he has established his right or cleared his character, and is content to accept forty shillings and his costs.

(iii.) Substantial damages are awarded where the jury seriously endeavour, as men of business, to arrive at a figure which will fairly compensate the plaintiff for the injury which he has in fact sustained.

(iv.) Vindictive damages are awarded where the jury, after viewing all the circumstances of the case, and particularly the motive and intention of the defendant, desire to mark their sense of his conduct ; they therefore punish him by awarding the plaintiff damages in excess of the amount which would be adequate compensation for the loss or injury which he has actually sustained. The jury are only allowed to give such damages in actions for breach of promise of marriage, assault, trespass, seduction, libel, slander, false imprisonment, malicious prosecution, and any other case in which the process of a court of justice has been abused.[2]

If, however, we regard not so much the amount, but the nature of the claim made, we must divide damages into :—

(i.) General.

(ii.) Special.

(i.) General damages are such as the law will presume to be the natural or probable consequences of the defendant's act. They need not be expressly pleaded or proved by evidence at the trial, for they arise by inference of law, even though no actual pecuniary loss has been, or can be, shown. Whenever the defendant breaks his contract or violates any absolute legal right of the plaintiff's, general

[1] See the judgment of Phillimore, J., in *Red Man's Syndicate* v. *Associated News papers* (1910), 26 Times L. R. 394 ; and *Nicolas* v. *Atkinson* (1909), 25 Times L. R. 568

[2] See *post*, p. 1310.

damage to at least a nominal amount is recoverable.[1] In such cases the law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's right. Thus the owner of a chattel who is deprived of the use of it through the wrongful act of another may recover substantial damages for the deprivation of it, though he cannot prove that he is out of pocket to any definite amount.

(ii.) Special damages, on the other hand, are such as the law will not infer from the nature of the act complained of; they must therefore be specially claimed on the pleadings,[2] and strictly proved at the trial. Such damages depend upon the special circumstances of the case, upon the defendant's position, upon the conduct of third persons, &c. Very probably they would not have been incurred had the same act been done on another occasion, or to a different plaintiff. In some actions of tort, where no actual and positive right of the plaintiff has been infringed, special damage is essential to the cause of action; and if it be not proved, judgment must be entered for the defendant. The term "special damage" has also been used in actions brought for a public nuisance, such as the obstruction of a river or a highway, to denote that actual and particular loss which the plaintiff has suffered beyond what is sustained by the general public; such particular loss is essential to the cause of action.[3]

Where, however, special damage is not essential to the cause of action, the plaintiff is entitled to recover general damages without proof of actual pecuniary loss. Still, in this case, if any special damage has in fact been suffered, the plaintiff can claim to be compensated for this in addition to his general damages, provided he has set out such claim in his pleading, so that the defendant may not be surprised at the trial. Should the plaintiff in such a case fail to prove

[1] *Ashby* v. *White* (1704), 1 Smith L. C., 11th ed., 240; *Marzetti* v. *Williams* (1830), 1 B. & Ad. 415; *Sanders* v. *Stuart* (1876), 1 C. P. D. 326.

[2] If not so pleaded, the defendant will be entitled to particulars. No particulars will be ordered of general damages.

[3] See the admirable judgment of Bowen, L. J., in *Ratcliffe* v. *Evans*, [1892] 2 Q. B. at pp. 528, 529.

his special damage, he may still resort to and recover general damages. A plaintiff who succeeds in recovering general damages may yet be ordered to pay the costs occasioned by a claim for special damage which he has failed to substantiate.[1]

*Special Damage, when essential to the Cause of Action.*—The law is very strict as to special damage where it is necessary to support the action. In such a case the plaintiff must prove the loss of money, or of some other material temporal advantage. The loss of a marriage, of employment, of income, of custom, of profits, and even of gratuitous entertainment and hospitality, will be special damage if the plaintiff can show that it was caused by the defendant, but not pain of mind, annoyance or vexation, or even physical illness so occasioned. Special damage may be either the loss of some right or position already acquired, or the loss of some future benefit or advantage, the acquisition of which is prevented. Thus, if the defendant causes a servant to lose his situation, or prevents his getting one—if he induces a stranger to abstain from going to the plaintiff's shop, or prevents an old customer from continuing to deal there—in each case there will be sufficient special damage. But a mere apprehension of future loss is not special damage.[2] Such damage must have accrued before action brought; it must be the natural or probable consequence of the defendant's act; it must be specially pleaded in the statement of claim; and it must be proved clearly and with certainty; otherwise the plaintiff will fail; for there are no general damages to which he can resort.

The plaintiff must also show clearly that the loss is the direct result of the defendant's conduct, and not the consequence of some independent act, some spontaneous resolve, of a third person. As a rule, he can only do this by calling as his witnesses at the trial the persons who ceased to employ him, or who were prevented by the defendant from dealing with him; and they must state in the box their reason for not employing, or not dealing with, the plaintiff. Else it will not be clear that the defendant caused them to do so.[3]

It is not always necessary, however, for the plaintiff to call as his witnesses those who have ceased to deal with him. He may be able to show, by his account-books or otherwise, a general diminution of business, as distinct from the loss of particular known customers or promised orders. He has still to connect that diminution of business with the defendant; but this is sometimes apparent from the nature of the case. Thus, where the defendant has published a statement about the plaintiff's business which is intended, or which is reasonably calculated, to produce, and in the ordinary course of things does produce, a general loss of business, evidence of such loss of business is admissible, and sufficient to support the

[1] *Forster* v. *Farquhar*, [1893] 1 Q. B. 564.
[2] *Michael* v. *Spiers & Pond* (1909), 101 L. T. 352.
[3] In one exceptional case (*Skinner & Co.* v. *Shaw & Co.*, [1894] 2 Ch. 581), a letter from a customer was received in evidence; but this would not be allowed in the King's Bench Division.

action, even though the words are not actionable *per se*, and although no specific evidence was given at the trial of the loss of any particular customer or order by reason of such publication.[1]

*Special Damage, when not essential to the Cause of Action.*—Where special damage is not essential to the action, it may still of course be proved at the trial to aggravate the damages, if it has been properly pleaded. The plaintiff must still prove that the special damage alleged is the direct result of the defendant's act. But the law is in this case not quite so strict as to what constitutes special damage as in cases where it is of the gist of the action. Thus the jury may take into their consideration such consequences as mental distress, illness, expulsion from a religious society, &c., which do not constitute special damage, where it is necessary to the cause of action.[2]

Again, the plaintiff may in this case allege and prove a general diminution of profits or decline of trade without naming particular customers or proving why they have ceased to deal with him. If, however, he wishes to rely on the loss of particular customers, he must plead such loss specially, either in addition to, or without, the allegation of a general loss of business; and in that case he must call the customers named as witnesses at the trial. Still, if the customers are not called at the trial, or if for any other reason the proof of the special damage fails, the plaintiff may still fall back on the general damage, and prove a general loss of income induced by the defendant's act.[3] And for this purpose he may give evidence as to the extent and nature of his business before and after the cause of action arose.

Lastly, where it is clear that the action lies without proof of any special damage, any loss or injury which the plaintiff had sustained in consequence of the defendant's act, even after action brought, may be proved to support the legal presumption that damage must necessarily flow from the violation of the plaintiff's right, although, when special damage is necessary to give the plaintiff a right of action, it must of course be proved to have arisen before the issue of the writ.

Another distinction is often drawn between prospective and continuous damage, but the true distinction is between a complete cause of action which may yet produce fresh damage in the future and a continuous cause of action. This distinction is dealt with in the next chapter.[4] By Order XXXVI., r. 58, "where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of assessment."

## III. Remoteness of Damage.

The general rule, no doubt, is that where a party sustains a loss by reason of a tort or breach of contract, he is, so far as money can do it, to be placed in the same position as if no

[1] *Ratcliffe* v. *Evans*, [1892] 2 Q. B. 524.
[2] *Per* Lord Wensleydale in *Lynch* v. *Knight* (1861), 9 H. L. Cas. at p. 598.
[3] *Evans* v. *Harries* (1856), 1 H. & N. 251; *Riding* v. *Smith* (1876), 1 Ex. D. 91.
[4] See *post*, pp. 1315, 1316.

such tort or breach of contract had happened.[1] But this, as we have already seen, requires some limitation. Certain elements of damage which a plaintiff has in fact sustained will be excluded from the consideration of the jury on the ground that they are "remote." The damage claimed must be the direct result of the defendant's act.[2] The plaintiff may sometimes be able to show that the defendant in fact contemplated and desired such result; in some cases the result is clearly the natural and necessary consequence of his act; in other cases it is so obvious and probable a consequence that it may fairly be said the defendant ought to have contemplated it, whether in fact he did so or not. But where the damage sustained by the plaintiff is neither the necessary nor the probable result of the defendant's conduct, nor such as can be shown to have been in his contemplation at the time, it will be excluded as too remote. Evidence cannot be given at the trial of any special damage which would not flow from the defendant's act in the ordinary course of things, unless there are special circumstances in the case which were known to the defendant, and which rendered that result probable. It is not enough that his act has in fact produced such damage, unless it can reasonably be presumed that the defendant, when he made the contract, or committed the tort, either knew, or ought to have known, that such damage would ensue.[3] And it will be deemed that he ought to have known it whenever a reasonable man placed as he was, and knowing what he knew and no more, would have recognised that it was a necessary or probable result of such an act.[4]

"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed

[1] In cases of breaches of trust, the Court will have regard rather to the profit which the trustee has made than to the mere loss which the beneficiary has sustained; see the remarks of Lord Cairns, L. C., in *Parker* v. *McKenna* (1874), L. R. 10 Ch. at p. 96.

[2] As to cases in which death results from defendant's act, contrast *Osborn* v. *Gillett* (1873), L. R. 8 Ex. 88, with *Jackson* v. *Watson*, [1909] 2 K. B. 193. See also *Frost* v. *Aylesbury Dairy*, [1905] 1 K. B. 608.

[3] See *Sanders* v. *Stuart* (1876), 1 C. P. D. 327; *Haddan* v. *Lott* (1854), 15 C. B. 411.

[4] *Bentley* v. *Metcalfe*, [1906] 2 K. B. 548.

to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."[1] Where a contract is made with reference to special circumstances, and such special circumstances are communicated by the plaintiff to the defendant, and are thus known to both the contracting parties, the damages which might reasonably be contemplated as likely to result from a breach of such contract would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated.[2] "The fact that a binding agreement has been arrived at does not of itself create a responsibility for all the injury flowing from a breach of it: the wrong-doer is *primâ facie* only liable for the natural and ordinary consequences of the breach; but where at the time of entering into the contract both parties know and contemplate that if a breach of the contract is committed some injury will accrue, in addition to the natural and ordinary consequences of the breach, the person committing the breach will be liable to give compensation in damages upon the occurrence of that injury; and where the contractee states that he wants the article agreed to be made in order to carry out another contract, the contractor, if he commits a breach in the delivery of the article, is liable for the loss sustained by the contractee, if he becomes unable to carry out that other contract."[3]

In the first place, the law excludes all loss which the parties could not reasonably be expected to foresee, although in the particular case it has in fact occurred. The plaintiff cannot recover for any loss which at the time of the defendant's wrongful act or of the making of the contract was merely speculative, or which depended upon a contingency, such, for instance, as the chance that the members of a club might think fit to alter their rules,[4] or that he might have been awarded a prize if his samples had arrived in time,[5] or that his ship might have earned certain profits if it had not been injured[6] or delayed.[7]

[1] *Per cur.* in *Hadley* v. *Baxendale* (1854), 9 Exch. at p. 354, followed in *Theobald* v. *Railway Passengers' Assurance Co.* (1854), 10 Exch. 45. See *Lancs. and Yorks. Ry.* v. *Gidlow* (1875), L. R. 7 H. L. 517 (where *Crouch* v. *G. N. Ry. Co.* (1856), 11 Exch. 742, was not cited), and *Bentley* v. *Metcalfe*, [1906] 2 K. B. 548.

[2] Adopted by Lord Chelmsford in *Bain* v. *Fothergill* (1874), L. R. 7 H. L. at p. 203. See *Smith* v. *Green* (1875), 1 C. P. D. 92; and *Skinner* v. *City of London Insurance Co.* (1885), 14 Q. B. D. 882.

[3] *Per* Bramwell, L. J., in *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. at p. 674.

[4] *Chamberlain* v. *Boyd* (1883), 11 Q. B. D. 407.

[5] *Simpson* v. *L. & N. W. Ry. Co.* (1876), 1 Q. B. D. 274.

[6] *The Columbus* (1849), 3 W. Rob. 158; *Shelbourne & Co.* v. *Law, &c., Insurance Corporation, Ltd.*, [1895] 2 Q. B. 626.

[7] *The Parana* (1877), 2 P. D. 118; *The Notting Hill* (1884), 9 P. D. 105; cf. *In re Smith and Belfast Corporation*, [1910] 2 Ir. R. 285. But there is no rigid rule of law that damages for loss of market can never be recovered: *Dunn* v. *Bucknall Bros.*, [1902] 2 K. B. 614.

Where a carrier neglected to deliver to a contractor within a reasonable time a broken mill-shaft, which was to be forwarded as a pattern for a new one, and the plaintiffs could not in the meantime work their mill, it was held by the Court of Exchequer that the damage to the plaintiffs' trade and the consequent loss of profit was too remote to be recovered in an action against the carrier, because such damage could not have been fairly and reasonably contemplated by both parties at the time they entered into the contract.[1] Again, in assessing the damages in an action of false imprisonment the jury may take into their consideration all the indignities of the ordinary prison routine which the plaintiff has suffered, as, for instance, the fact that he was handcuffed, or was bathed, or was compelled to have his hair cut short; but the defendant is not liable for any improper violence or excess on the part of the police.[2]

So the failure to pay a debt when it falls due may cause the destruction of the creditor's trade, and the debtor may know that his creditor is in danger of being ruined by such non-payment; yet the true measure of damages is merely a reasonable compensation for the non-payment of the money, which, in the absence of any express stipulation in the contract, will be only the payment of interest at the usual rate.[3] "If an agent who is bound to render an account and to pay over moneys to his principal at a particular time should omit so to do, whereby the principal should be unable to pay his debts or to fulfil his other contracts, and should stop payment and fail in business, or be injured in his general credit thereby, the agent would not be liable for such injury; for it is but a remote or accidental consequence of the negligence."[4]

On the other hand, a plaintiff can recover for any loss, which he has in fact sustained, if it was, though not a certain, yet so probable a consequence of the defendant's act that a reasonable man ought to have foreseen it.

Thus, if the defendant turns the plaintiff's horses out of their warm stable without any clothing, they will probably catch cold, and the defendant therefore will be liable for any depreciation in their value caused by such cold.[5] So if a tenant, contrary to his covenant, assigns the premises without the consent of the landlord to a person who uses them for a turpentine distillery, and so sets them on fire, the tenant is liable for the damage caused by the fire.[6]

The rules as to the remoteness of damage may well be illustrated by cases, in which a passenger complains of having been unduly delayed on

[1] *Hadley* v. *Baxendale* (1854), 9 Exch. 341.
[2] *Mason* v. *Barker* (1843), 1 Car. & K. 100.
[3] See the remarks of Bovill, C. J., in *British Columbia Saw Mill Co.* v. *Nettleship* (1868), L. R. 3 C. P. at p. 506; and *Prehn* v. *Royal Bank of Liverpool* (1870), L. R. 5 Ex. 92.
[4] Story on Agency, 9th ed., 262.
[5] *McMahon* v. *Field* (1881), 7 Q. B. D. 591.
[6] *Lepla* v. *Rogers*, [1893] 1 Q. B. 31.

his journey, of having failed to make an advertised connection at a certain station, or of having been taken to a wrong station. In such cases the plaintiff can recover damages for the inconvenience caused him and the cost of being conveyed to his proper destination by reasonable means, but not the cost of a special train, nor damages for illness resulting from the inconvenience suffered.[1]

Again, the defendant is never liable for consequential loss of the possibility of which he was never informed, and which without such information he had no reason to anticipate. Thus, where a passenger was pulled out of a railway carriage by the company's servants under the mistaken belief that he was riding without a ticket, and left behind him on the seat a pair of race-glasses, it was held that he could not recover for the loss of the race-glasses, because such loss was not a natural or necessary consequence of the assault.[2]

But if the loss sustained by the plaintiff be the natural and necessary consequence of the defendant's act, it does not matter that he never either intended or contemplated it.

This is forcibly illustrated by the case of *The City of Lincoln*.[3] A collision took place between a steamer and a barque, the steamer being alone to blame; and the steering compass, charts, log, and log glass of the barque were lost or destroyed. Owing to the loss of these requisites for navigation, and without any negligence on the part of the captain or crew, the barque, while on her way to a port of safety, grounded, and had to be abandoned. The Court of Appeal held that the grounding of the barque was a natural and reasonable consequence of the collision, and that the owners of the steamer were liable for the damage caused thereby.

Again, where a workman lost his eyesight in consequence of an accident, and this so preyed upon his mind that he became insane and committed suicide, it was held that his death was the direct result of the accident.[4]

So, too, where A. recommended B. to employ a stockbroker who, as he ought to have known, was not a fit person to be trusted, A. was held liable for all the loss sustained by B. through the stockbroker misappropriating money entrusted to him for investment.[5]

The damage claimed must be the direct result of the defendant's act. He is not liable for any damage caused by

[1] *Le Blanche* v. *L. & N. W. Ry. Co.* (1876), 1 C. P. D. 286; *Hobbs* v. *L. & S. W. Ry. Co.* (1875), L. R. 10 Q. B. 111; see also *Anglo-Algerian S. S. Co.* v. *Houlder*, [1908] 1 K. B. 659, which was, however, a case rather of absence of duty than of remoteness of damage.

[2] *Glover* v. *L. & S. W. Ry. Co.* (1867), L. R. 3 Q. B. 25; and see also *Cobb* v. *G. W. Ry. Co.*, [1894] A. C. 419, and *Sanders* v. *Stuart* (1876), 1 C. P. D. 327.

[3] (1889), 15 P. D. 15; and see *Sneesby* v. *Lancs. & Yorks. Ry. Co.* (1875), 1 Q. B. D. 42; *Sapwell* v. *Bass*, [1910] 2 K. B. 486.

[4] *Malone* v. *Cayzer* (1908), S. C. 479; and see *The Annie*, [1909] P. 176.

[5] *De la Bere* v. *Pearson, Ltd.*, [1908] 1 K. B. 280.

facts or circumstances unconnected with himself, such as the spontaneous action of a third person. The defendant's act must, at all events, be the predominating cause of the alleged damage. But if the defendant by his conduct directly causes or compels a third person to do an act which produces damage to the plaintiff, such damage is not too remote, provided the defendant either did contemplate or ought to have contemplated such a result. The defendant is not responsible for any eccentric or foolish, nor *primâ facie* for any negligent or illegal conduct on the part of a third person. But he is responsible for the ordinary and reasonable consequences of his own act; and it may be an ordinary and reasonable consequence of the defendant's act that a third person may do something which injures the plaintiff. Thus, where an innocent third person moved an obstruction which the defendant had illegally placed in a public highway, and thereby injured the plaintiff, the defendant was held liable for the consequences of that third person's act.[1] And even where the act of the third person is in itself a crime or a tort, still the defendant may, in some cases, be liable for that illegal act, if it was his obvious intention, or the natural result of his conduct, to induce that third person so to act;[2] and it is immaterial whether the plaintiff has or has not also a right of action against such third person.

Again, a defendant is not, as a rule, liable for any repetition by another of his tortious act. Thus in slander, the special damage must be the direct result of the defendant's words, not of some one else's. If A. chooses of his own accord to repeat the defendant's words, this is A.'s own act, for the consequences of which he alone is liable. But here again comes in a similar exception. If the republication by A. be the natural or necessary consequence of the defendant's publication to A., or if the defendant intended or desired A. to repeat his words, the defendant is liable for all the consequences of A.'s republication, for he directly caused it.[3]

Again, if A.'s misconduct or breach of contract necessarily involves B. in litigation with C., B. can in a subsequent

[1] *Clark* v. *Chambers* (1878), 3 Q. B. D. 327; and see *Halestrap* v. *Gregory*, [1895] 1 Q. B. 561.

[2] See the remarks of Lord Alverstone, C. J., in *De la Bere* v. *Pearson, Ltd.*, [1907] 1 K. B. 483 (affirmed, [1908] 1 K. B. 280).

[3] See Odgers on Libel and Slander, 4th ed., pp. 386 *et seq.*

action recover from A. the damages and often also the costs which he has been compelled to pay.[1] And if B. settles the action by a proper and judicious compromise, he can recover from A. the amount which he has paid to C. under the compromise, although it is possible that he might have won the action, if he had fought it to the end.

Thus, where the defendant employed the plaintiff to manufacture and mark bricks in such a way that they infringed A.'s trade mark the defendant being aware and the plaintiff unaware of the infringement, and A. brought a suit in Chancery against the plaintiff, claiming an injunction and damages for such infringement, it was held to be a natural consequence of the defendant's conduct that the plaintiff should be involved in this Chancery suit; and that, therefore, the plaintiff could recover from the present defendant the amount at which he had compromised the suit, although the fact that he did not know he was infringing any trade mark might have afforded him a good defence to the claim for damages, though not to the claim for an injunction.[2] Again, where A. supplied sacks to B. for the purpose of unloading a cargo of peas from a ship, and, owing to its unfit condition, one sack full of peas broke and injured a man who obtained damages from B., it was held that B. could recover the damages and costs thus incurred from A.[3]

It has always been clear law that, if the defendant has by his wrongful act exposed the plaintiff to legal proceedings at the suit of a third person, he must recoup the plaintiff for any damages which he may thus have been compelled to pay in the action. But it was formerly doubted whether the plaintiff could recover the costs which he had been compelled to pay to his successful opponent and further whether he could also recover the costs to which he himself had been put in defending the action. It was urged with some reason that, if he had no answer to the action, he should not have incurred costs by defending it. "No person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance to an action which he cannot defend."[4] Yet in many cases such costs are recoverable as damages. Nay more, he may also, in a proper case, recover the costs which he has had to pay his own solicitor as between solicitor and client.[5] Thus costs reasonably incurred in defending an action resulting from the default of the defendant can be recovered,[6] but not the costs of improvidently defending an action brought against the plaintiff by

[1] *Mowbray* v. *Merryweather*, [1895] 2 Q. B. 640.
[2] *Dixon* v. *Fawcus* (1861), 30 L. J. Q. B. 137.
[3] *Vogan* v. *Oulton* (1899), 81 L. T. 435.
[4] *Per* Lord Denman, C. J., in *Short* v. *Kalloway* (1839), 11 A. & E. at p. 31.
[5] *Agius* v. *Great Western Colliery Co.*, [1899] 1 Q. B. 413; and see *Crage* v. *Fry* (1903), 67 J. P. 240; *Prince of Wales Dry Dock Co.* v. *Fownes & Co.* (1904), 90 L. T. 527.
[6] *Hammond* v. *Bussey* (1887), 20 Q. B. D. 79, followed in *Agius* v. *Great Western Colliery Co.*, *supra*.

his sub-vendee for breach of warranty.[1] But, under a covenant to indemnify against all actions and claims in respect of the covenants of a lease, costs properly incurred in reasonably defending an action brought for a breach of one of the covenants are recoverable as damages.[2] Where a person makes a contract as agent, he thereby impliedly warrants that he has authority in that capacity to contract, and the costs of a Chancery suit instituted by plaintiff in reliance upon the agent's representation of authority can be recovered.[3]

In a similar case, however, the plaintiff was only allowed to recover the costs of the previous action up to the time when the answers to the interrogatories delivered to his opponent had been received and considered by his legal advisers. Such was the nature of these sworn answers that the Court was of the opinion that after receiving them he should have abandoned his defence, and, therefore, that the subsequent costs were not reasonably incurred.[4]

## IV. Measure of Damages in Actions of Tort.

The expression "measure of damages" is used to denote the scale or rule by reference to which in any given case damages are to be assessed, the criterion by which a jury should determine the amount of their verdict. In some actions of tort, as we have seen, the jury is permitted to award vindictive or exemplary damages. In others, special damage is of the essence of the action, and the plaintiff can strictly recover damages only in respect of the special damage pleaded and proved. But between these two extremes lies a large category of actions of tort, in which the guiding rule as to the measure of damages is that the defendant is only liable for such damages as he in fact contemplated or ought to have contemplated when he committed the tort. Every man is presumed to intend and to know the natural and ordinary consequences of his acts; and this presumption is not rebuttable merely by proof that he did not at the time attend to or think of such consequences, or hoped or expected that they would not follow. Hence the defendant will be liable in every case for the natural and necessary consequences of his

[1] *Wrightup* v. *Chamberlain* (1839), 7 Scott, 598.

[2] *Murrell* v. *Fysh* (1883), 1 C. & E. 80; but see *Maxwell* v. *British Thomson Houston Co.*, [1904] 2 K. B. 342.

[3] *Collen* v. *Wright* (1857), 26 L. J. Q. B. 147; 27 L. J. Q. B. 215; *Spedding* v. *Nevell* (1869), L. R. 4 C. P. 212; *Meek* v. *Wendt* (1888), 21 Q. B. D. 126.

[4] *Godwin* v. *Francis* (1870), L. R. 5 C. P. 295, 306.

act, whether he in fact contemplated them or not. He will be liable also for every consequence which, at the time of committing the tort, he did in fact contemplate as a probable, though it was not a necessary, result of his act. But if a particular result is not a natural or necessary consequence of the defendant's act, and can only be recognised as a probable consequence in the light of certain special circumstances peculiar to the particular case, then the defendant will not be responsible for that result unless he was aware of those special circumstances at the time when he committed the tort. Moreover, "the defendant is not liable for any further damage which could have been avoided or minimised by the exercise of reasonable care on the part of the plaintiff." [1]

In most cases of tort, however, the jury have little or nothing to guide them as to the amount of the damages. Thus the pain and suffering caused by personal injuries are not capable of an exact computation in money, nor in cases of defamation can any accurate estimate be formed of the probable loss to the plaintiff. The jury must take into account the social or business position of the parties and the circumstances of the case, including any matters which may tend to aggravate or mitigate the damages, and upon these materials estimate as reasonable men of the world what is a fair recompense to the plaintiff for the wrong and indignity done to him.

It will be convenient to deal separately with those actions of tort which occur most frequently in practice.

*Conversion.*—In an action of conversion the measure of damages ordinarily is the fair market value of the goods at the date of their conversion.[2] The price which the goods fetched on a subsequent sale of them by the defendant is no criterion as to this.[3]

*Detention of Goods.*—Where the defendants detained from the plaintiff certain cargoes that had been assigned to him, Kay, J., allowed the plaintiff, as damages for such detention, 5 per cent. interest upon the value of the cargoes down to the date of the judgment; and the Court of Appeal

[1] *Per* Lord Shaw in *Grant* v. *Owners of S.S. Egyptian*, [1910] A. C. at p. 403; and see *The Bruxellesville*, [1908] P. 312.
[2] *France* v. *Gaudet* (1871), L. R. 6 Q. B. 199.
[3] *Thompson* v. *Pettitt* (1847), 10 Q. B. 101.

(Bowen, L. J., dissenting) approved this method of assessing the damages.[1] Where corn was improperly detained by the Customs, the jury were allowed to take into account in assessing the damages the fact that in the meantime the price of corn had fallen.[2] The same rules apply to the detention of a ship, whether a merchant vessel[3] or a man-of-war.[4]

*Fraud.*—In actions of fraud, the jury are apt to treat the plaintiff liberally, although the law draws no distinction between this and other ordinary actions of tort.[5] The plaintiff may clearly recover damages for any injury which is the direct and natural consequence of his acting on the faith of the defendant's representations. Thus where a cattle dealer sold the plaintiff a cow, which had foot-and-mouth disease, and fraudulently represented it was free from infectious disease, and the plaintiff placed it with five others, who caught the disease and died, it was held that the plaintiff was entitled to recover, as damages, the value of all six cows.[6] Where the plaintiff is induced by the fraud of the defendant to take up shares, the damages recoverable are the difference between the price paid for them and their real value on allotment.[7] This value is not necessarily the market value; it may be ascertained by the light of subsequent events, *e.g.*, the estimated dividend on the winding-up of the company.[8]

*Infringement of Patent, Copyright, &c.*—Where a patent has been infringed, the measure of damages has been declared by the Court of Appeal to be the pecuniary loss actually sustained by the patentee through the infringement, and no more.[9] Where the copyright in a book has been infringed, the measure of damages, in addition to the delivery up of the copies in the defendant's possession, is the actual amount of the proceeds of the copies sold.[10]

*Personal Injuries.*—In an action to recover damages for personal injury caused by the negligence of the defendant, the jury "must not attempt to give damages to the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case, and give what they consider, under all the circumstances, a fair compensation."[11] Thus, if a professional man who is earning a regular income be permanently disabled from earning his living by a railway accident, the jury ought not to give him such a sum as, if invested, would produce the full amount of income which he would probably have earned, but ought in

[1] *Dreyfus* v. *Peruvian Guano Co.* (1889), 42 Ch. D. 66; 43 Ch. D. 316; [1892] A. C. 166.
[2] *Barrow* v. *Arnaud* (1846), 8 Q. B. 595.
[3] *The Mediana*, [1900] A. C. 113; but see *The Bodlewell*, [1907] P. 286.
[4] *The Astrakhan*, [1910] P. 172.
[5] See, for instance, *Twycross* v. *Grant* (1877), 2 C. P. D. 469; *Waddell* v. *Blockey* (1879), 4 Q. B. D. 678.
[6] *Mullett* v. *Mason* (1866), L. R. 1 C. P. 559; and see *Smith* v. *Green* (1875), 1 C. P. D. 92.
[7] *In re Leeds and Hanley Theatre of Varieties*, [1902] 2 Ch. 809.
[8] *Derry* v. *Peek* (1887), 37 Ch. D. 541; (1889), 14 App. Cas. 337; *McConnel* v. *Wright*, [1903] 1 Ch. 546.
[9] *British Motor Syndicate* v. *Taylor*, [1901] 1 Ch. 122.
[10] *Muddock* v. *Blackwood*, [1898] 1 Ch. 58.
[11] *Per* Brett, J., in *Rowley* v. *L. & N. W. Ry. Co.* (1873), L. R. 8 Ex. at p. 231; and see *Phillips* v. *L. & S. W. Ry. Co.* (1879), 4 Q. B. D. 406; 5 Q. B. D. 78.

estimating the damages to take into account the accidents of life, &c.[1] The jury may, nevertheless, take into account any reasonable prospect of increasing income which the plaintiff had, and of which he has been deprived by the injury.[2] They should not take into account any sum the plaintiff has received under a policy of insurance against accidents[3] or from the charity of benevolent strangers. The plaintiff will be entitled to recover any sum of money reasonably paid, or the amount of any liability reasonably incurred for medical attendance, extra nourishment and nursing; or for providing a substitute to attend to the plaintiff's business, and do his work while he is ill; but not for any speculative damage, such as the loss of a prize or of a situation which the plaintiff thinks he would have been sure of gaining, if he had not been injured or detained.[4]

If the injuries, in the ordinary course of nature, produce disease or disablement (*e.g.* if a limb has to be amputated), the defendant must compensate the plaintiff for such consequences. It was decided in 1888 by the Privy Council that damages resulting from a nervous shock, caused by fear of a threatened collision, which did not occur, were too remote to be recoverable.[5] But this decision has been much questioned both in England and Ireland,[6] and cannot now be regarded as an authority in our English Courts. Again, where the defendant's servants so negligently drove a two-horse van along the street that it dashed into a public-house where the female plaintiff was seated behind the bar, and the shock caused her to give premature birth to a child, it was held that the defendants were liable for all the natural consequences of the shock thus given to her, although there was no actual impact. If, however, the shock had produced no physical evil effects upon the plaintiff, but had caused her a merely transitory mental emotion, such a fright would not be damage sufficient to sustain an action for negligence.[7] Where the defendant falsely and maliciously told a wife that her husband had been seriously injured and was in great danger, and the shock caused by such statement brought on a dangerous and serious illness, and the husband was put to expense for medical attendance, Wright, J., allowed the jury to award the plaintiff £100 damages over and above the out-of-pocket expenses incurred.[8] So in any action for an assault, however slight, the offensive demeanour of the defendant, any insulting words used by him at the time of the assault, and even the rank and social position of the parties may be taken into account by the jury in assessing the damages.

*Recovery of Land.*—In an action for recovery of possession of land

[1] *Johnston* v. *G. W. Ry. Co.*, [1904] 2 K. B. 250.
[2] *Fair* v. *L. & N. W. Ry. Co.* (1869), 10 W. R. 66.
[3] *Bradburn* v. *G. W. Ry. Co.* (1874), L. R. 10 Ex. 1; and see 8 Edw. VII. c. 7.
[4] *Hoey* v. *Felton* (1861), 11 C. B. N. S. 142.
[5] *Victorian Railways Commissioners* v. *Coultas* (1888), 13 App. Cas. 222.
[6] *Pugh* v. *L. B. & S. C. Ry. Co.*, [1896] 2 Q. B. 248; *Bell* v. *G. N. Ry. Co.* (1890), 26 L. R. (Ir.) Ex. D. 428.
[7] *Dulieu* v. *White*, [1901] 2 K. B. 669, 673; cf. *Yates* v. *South Kirby, &c., Collieries*, [1910] 2 K. B. 538.
[8] *Wilkinson and wife* v. *Downton*, [1897] 2 Q. B. 57.

mesne profits may be claimed from the date of the defendant's entry on the premises till possession is obtained by the plaintiff.[1]

*Trespass to Land.*—In an action for trespass to land the jury is not restricted to the exact amount of actual damage done by the defendant treading down the grass, injuring the crops or flowers, &c. This would be putting an unlicensed trespasser upon the same footing as one who entered with leave and licence and accidentally did damage.[2] If an action be brought by a reversioner for injury to his reversionary freehold interest in land by pulling down a house erected upon it, the measure of damages would be ascertained by considering to what extent the value of his reversionary interest in the land was lessened by the wrongful act of the defendant.[3] Again, where the defendant had cut away some soil from land belonging to the plaintiff, it was held that the measure of damages was not the cost of restoring the land to its former condition, but the value to the plaintiff of the soil actually taken away.[4] The plaintiff may prove circumstances of aggravation, *e.g.*, that the defendant entered his house under a false charge that the plaintiff had stolen goods therein, and the jury may give damages for the trespass, aggravated as it is by such false charge.[5] If the defendant deliberately persists in trespassing on the plaintiff's land after notice that he is trespassing, and uses intemperate and offensive language when civilly requested to withdraw, the jury may give damages for the trespass committed under such circumstances far in excess of any damage sustained by the plaintiff.[6] So where the defendant wrongfully and negligently injured the plaintiff's stable with the object of compelling him to give up possession of it to the defendant, the jury were allowed to take all the circumstances into their consideration in assessing the amount of damages.[7] "Where a wrongful act is accompanied by words of contumely and abuse, the jury are warranted in taking that into consideration and giving retributory damages."[8]

## V. Measure of Damages in Actions of Contract.

The measure of damages in actions of contract is in most respects identical with that in actions of tort. Yet there are some differences which deserve attention. A contract is founded upon the consent of the parties; the measure of damages in actions of contract may therefore be affected by their stipulations. In actions of tort, on the other hand,

[1] *Southport Tramways Co.* v. *Gandy*, [1897] 2 Q. B. 66.
[2] See the remarks of Maule, J., in *Williams* v. *Currie* (1845), 1 C. B. at p. 847; cf. *Lodge Holes Colliery Co.* v. *Wednesbury Corporation*, [1908] A. C. 323.
[3] *Batteshill* v. *Reed* (1856), 18 C. B. 696.
[4] *Jones* v. *Gooday* (1841), 8 M. & W. 146.
[5] *Bracegirdle* v. *Orford* (1813), 2 M. & S. 77.
[6] *Merest* v. *Harvey* (1814), 5 Taunt. 442; *Williams* v. *Currie* (1845), 1 C. B. 841.
[7] *Emblen* v. *Myers* (1860), 6 H. & N. 54.
[8] *Per* Byles, J., in *Bell* v. *Midland Ry. Co.* (1861), 10 C. B. N. S. at p. 308.

where no privity is needed, a wider discretion is often, as we have seen, allowed to the jury, and many elements are rightly deemed material which could not properly affect the verdict in an action of contract. For instance, in an action of tort the jury may, as a rule, take into their consideration the conduct of the defendant, or the motive which induced him to commit the tort. But in estimating the damages in an action of contract the motive or intention of the defendant is immaterial. Should either party commit a breach of his covenant or promise, it is right that he should be compelled to compensate the other party. But as a rule his motive for breaking his contract will be entirely disregarded, and the damages payable will be limited to the pecuniary loss directly resulting to the plaintiff from the breach of contract. Nor can the plaintiff's own conduct be taken into consideration. If, for instance, the plaintiff, after the writ was issued, broke his part of the contract, evidence of this fact cannot be given to reduce the damages, which the defendant must pay for the breach of contract sued on,[1] though it might be made the subject of a counterclaim. To this rule there is one exception. In an action for breach of promise of marriage[2] the jury is given a wide latitude, and assume, in some sort, to punish the defendant, as well as to compensate the plaintiff.

This distinction between actions of tort and actions of contract may be well illustrated by reference to the rule, *Omnia præsumuntur contra spoliatorem* (Everything is presumed against a wrong-doer). Thus in the well-known case of *Armory* v. *Delamirie*,[3] where the defendant's apprentice had wrongfully abstracted a valuable jewel from a ring which the plaintiff had found, and the jewel was not produced in Court, it was held that the measure of damages was the value of the jewel of the finest water that would fit the empty socket. But in actions of contract a different rule prevails. If a contract be made in the alternative, so that it can be performed in one or other of two ways at the election of the defendant, and he does neither, the damages will be assessed against him on the alternative which is least profitable to the plaintiff, and least burdensome to the defen-

[1] See the judgment of Jervis, C. J., in *Bartlett* v. *Holmes* (1853), 13 C. B. at p. 638, and of Maule, J., in *Lewis* v. *Clifton* (1854), 14 C. B. at p. 255.

[2] *Berry* v. *Da Costa* (1866), L. R. 1 C. P. 331, 333, approved in *Millington* v. *Loring* (1880), 6 Q. B. D. 190, 195.

[3] (1722), 1 Smith's L. C., 11th ed., p. 356.

dant.[1] But if the defendant by his own act renders performance of the contract in one way impossible, and then fails to perform it in the other, the damages must be measured according to the second alternative, which is the only one left open.[2]

For a bare breach of contract nominal damages, at all events, will be recoverable. Where a contract stipulates for the payment on a day named of a specific sum, the measure of damages *primâ facie* will be the sum thus stipulated to be paid, together with interest when recoverable.[3] "No matter what the amount of inconvenience sustained by the plaintiff in the case of non-payment of money, the measure of damages is the interest of the money only."[4] "The normal measure of damages for non-payment of money is interest where interest is allowable by contract or by law."[5] So for breach of a promise to lend money nominal damages only can, as a rule, be recovered. The plaintiff is supposed to be in such good credit that he can easily borrow the same sum elsewhere.[6]

In other cases the general rule as to the measure of damages in actions of contract is that, in the absence of any express stipulation, fixing the amount of damages to be paid on breach of the contract, the plaintiff is *primâ facie* entitled to be compensated for the whole of the damage which he has sustained as the direct consequence of the breach, provided that such damage was or ought to have been in the contemplation of the parties at the time they made the contract.

A wider rule was formerly laid down by Parke, B.: "Where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."[7] Hence it was formerly laid down that it was the duty of the jury to assess as accurately as they could the differ-

[1] *Cockburn* v. *Alexander* (1848) 6 C. B. 791, 814; *Deverill* v. *Burnell* (1873), L. R. 8 C. P. 480.

[2] *McIlquham* v. *Taylor*, [1895] 1 Ch. 53, 62; *Ashmore* v. *Cox*, [1899] 1 Q. B. 436.

[3] As to the cases in which interest is recoverable, see *ante*, p. 1139.

[4] *Per* Willes, J., in *Fletcher* v. *Tayleur* (1855), 17 C. B. at p. 29.

[5] *Per* Chitty, J., in *In re English Bank of the River Plate*, [1893] 2 Ch. at p. 446.

[6] See the remarks of Jessel, M. R., in *Wallis* v. *Smith* (1882), 21 Ch. D. at p. 257; and *South African Territories* v. *Wallington*, [1897] 1 Q. B. 692; [1898] A. C. 309.

[7] *Robinson* v. *Harman* (1848), 1 Exch. at p. 855. As to damages for breach of a contract for the sale of land, see *Flureau* v. *Thornhill* (1776), 2 W. Bl. 1078; *Bain* v. *Fothergill* (1874), L. R. 7 H. L. 158; *Morgan* v. *Russell*, [1909] 1 K. B. 357.

ence between the financial position in which the plaintiff found himself with the contract broken and that in which he would have been if the contract had been duly performed. And no doubt in many cases that difference is still *primâ facie* the amount to which he is entitled as damages. But it was soon discovered that this rule included losses which the defendant could not reasonably be expected to anticipate. Thus, in the leading case of *Hadley* v. *Baxendale*,[1] the plaintiffs were owners of a steam flour mill, the shaft of which was broken; they sent it to the defendants, who were carriers, to take to an engineer, to serve as a model for a new shaft. The defendants' clerk was told at the time that the mill was stopped, and that the shaft must be forwarded immediately. But he was not told that the want of the shaft was the only thing which was keeping the mill idle. The delivery of the shaft was delayed for an unreasonable time, and in consequence the plaintiffs could not work their mill. But it was held that they could not recover any damages for their loss of profit while the mill was kept idle, because such loss of profit was not the natural consequence of a delay in forwarding a broken shaft; and the defendants had not sufficient notice of the special facts of the case to make it clear to them that such a loss was a probable result of such delay. It was not, in short, a consequence which might fairly and reasonably be presumed to have been contemplated by the parties when they made the contract. And ever since this decision it has been the rule in England that on a breach of contract the party breaking his contract must pay the other party only such damages as are the natural and necessary consequences of the breach, together with all such further and other damages as, owing to the special circumstances of the particular case, must be taken to have been in contemplation of the parties at the time when the contract was made.[2]

Another principle has sometimes been suggested for assessing damages in actions for breach of contract, namely, that if one of the parties omits or refuses to perform his part of it, the other may perform it for him as nearly as may be, and may claim from him as damage the reasonable expense of so doing.[3] In many cases, no doubt, the jury may arrive by this method at a figure approximately correct. But it must be admitted that the cost of performance is not as a rule the proper measure of damage.[4]

The mere fact that the defendant has broken his contract

[1] (1854), 9 Exch. 341.

[2] *Hinde* v. *Liddell* (1875), L. R. 10 Q. B. 265; *Bostock & Co., Ltd.* v. *Nicholson & Sons, Ltd.*, [1904] 1 K. B. 725.

[3] *Prehn* v. *Royal Bank of Liverpool* (1870), L. R. 5 Ex. 92; *Hinde* v. *Liddell* (1875), L. R. 10 Q. B. 265; *Le Blanche* v. *L. & N. W. Ry. Co.* (1876), 1 C. P. D. 286, 313; cf. *Lodge Holes Collieries* v. *Wednesbury Corporation*, [1908] A. C. 323.

[4] *Wigsell* v. *School for Indigent Blind* (1882), 8 Q. B. D. 357, 364.

entitles the plaintiff to at least some nominal damages.[1] The difficulty always arises as to the further amount claimed. Damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances were known to the defendant at the time when he entered into the contract. If, however, such special circumstances were previously known, or were communicated, to him at that time, and the damage sought to be recovered flows naturally from the breach of contract under these special circumstances, then that damage is recoverable, whether it was in fact contemplated by the parties to the contract or not. It is not necessary that the defendant should expressly undertake to be answerable for such damage, nor is it necessary that he should have express notice that a breach of the contract would in such special circumstances cause such damage; it is enough if he had distinct notice of the special circumstances which rendered it necessary or probable that such damage would flow from the breach. Notice of such special circumstances after the contract was made will not avail, as it cannot be inferred from such notice that the defendant ever consented to become liable for such special damage.[2] But if after notice of the special circumstances he deliberately enters into the contract, he may reasonably be supposed to have contemplated as the probable result of any breach of it all damage which arises naturally or probably out of such special circumstances.[3]

Now let us apply these general rules to certain special classes of action.

*Breach of Warranty.*—In an action brought for the breach of warranty of a horse, if the horse has been returned, the plaintiff will be entitled to recover the whole price; if the horse is not returned, the difference between his real value and the price; or the plaintiff may sell the horse for what he can get, and recover the residue of the price paid in damages.[4] If the horse

[1] But a subsequent acceptance of the sum due under a contract to pay money is a waiver of any claim to nominal damages for non-payment at the time agreed: *Tetley* v. *Wanless* (1867), L. R. 2 Ex. 275; *Harper* v. *Linthorpe Dinsdale Co.* (1909), 101 L. T. 608.

[2] *British Columbia Saw Mill Co.* v. *Nettleship* (1868), L. R. 3 C. P. at pp. 505, 506.

[3] See *Simpson* v. *L. & N. W. Ry. Co.* (1876), 1 Q. B. D. at p. 277, and *G. W. Ry. Co.* v. *Redmayne* (1866), L. R. 1 C. P. 329.

[4] *Caswell* v. *Coare* (1809), 1 Taunt. 566; and see the remarks of Bramwell, L. J., in *Waddell* v. *Blockey* (1879), 4 Q. B. D. at p. 681.

be not tendered to the vendor, the plaintiff can recover no damages for the expense of his keep. But if he tendered the horse, he may recover for the keep for such time as would be required to sell him to the best advantage.[1] So on the sale of other goods. The plaintiff purchased at an auction for £21 an orchid which was really worth only 7*s.* 6*d.*, but the defendant warranted it to be one of an extremely rare species; if it had been so it would have been worth £50. It was held that the plaintiff was entitled to recover £50.[2] So where the defendant sold to the plaintiff fish which he warranted sound though it was, in fact, unsound, and the plaintiff was in consequence fined £20 and costs, and incurred other costs in his defence, it was held that the plaintiff could recover both the sums which he had paid for costs, but not the fine.[3] The law is similar where there is an implied warranty. Thus, on the sale of a chattel there is an implied warranty that it is fit for the purpose for which it is sold. In *Randall* v. *Newson*,[4] the plaintiff bought from the defendant a carriage-pole, which was defective and broke whilst in use. The horses, terrified by this, ran away and were much injured. It was held that the plaintiff was entitled to recover the value of the pole, and also for damage to the horses, if the jury, on a second trial, should be of the opinion that the injury to the horses was the natural consequence of the defect in the pole. So on a sale by description where the plaintiffs purchased from the defendants for resale sulphuric acid described as "commercially free from arsenic," and the defendants delivered sulphuric acid which was not free from arsenic, and which was therefore worthless and spoilt other goods of the plaintiffs, it was held that they could recover the price of the acid and the value of the goods spoilt, but not the damages which they were compelled to pay to third parties to whom they had resold it, nor the damage done to their goodwill in consequence.[5]

*Breach of Covenant to Repair.*—The Court of Appeal has decided that the cost of putting the premises into the state of repair required by the covenant was the measure of damages, and that such measure was not affected by the fact that the lessor had granted another lease from the expiration of defendant's term and was no worse off.[6] The damages recoverable, however, in an action brought during the currency of the tenancy for a breach of a covenant to repair are measured by the loss which the landlord sustains by reason of the depreciation in the saleable value of the reversion.[7] Where, however, the premises were held under an underlease, and the under-lessee had notice at the time of entering into his covenant to repair of a similar covenant in the superior lease, the fact that

[1] *M'Kenzie* v. *Hancock* (1826), Ry. & M. 436.
[2] *Ashworth* v. *Wells* (1898), 78 L. T. 136.
[3] *Crage* v. *Fry* (1903), 67 J. P. 240.
[4] (1877), 2 Q. B. D. 102.
[5] *Bostock & Co., Ltd.* v. *Nicholson & Son, Ltd.*, [1904] 1 K. B. 725.
[6] *Joyner* v. *Weeks*, [1891] 2 Q. B. 31; but as to whether this rule is an absolute one, see the judgment of Lord Esher, M. R., at p. 43.
[7] *Henderson* v. *Thorn*, [1893] 2 Q. B. 164; and see *Whitham* v. *Kershaw* (1885), 16 Q. B. D. 613.

the lessor was under a liability to yield up the premises in repair is a circumstance to be considered in assessing the damages.[1]

*Carriers.*—"The extent of a carrier's liability is to be governed by the contract he has entered into, and the obligations which the law imposes upon him. He is not to be made liable for damages beyond what may fairly be presumed to have been contemplated by the parties at the time of entering into the contract. It must be something which could have been foreseen and reasonably expected, and to which he has assented expressly or impliedly by entering into the contract."[2] Where goods are delivered to a carrier to be carried from one place to another and are lost, their owner is entitled to recover the value of the goods at the place at which they ought to have been delivered to the consignee.[3]

As regards the liability of a carrier by land for delay in the conveyance of goods or live stock, "the principle is now settled that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object."[4]

"If goods are sent by a carrier to be sold at a particular market, if, for instance, beasts are sent by railway to be sold at Smithfield, or fish is sent to be sold at Billingsgate, and, by reason of delay on the part of the carrier, they have not arrived in time for the market, no doubt damages for the loss of market may be recovered. So if goods are sent for the purpose of being sold in a particular season when they are sold at a higher price than they are at other times, and if by reason of breach of contract they do not arrive in time, damages for loss of market may be recovered. Or if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time, that may be a ground for giving damages for their arriving too late and selling for a lower sum."[5] There is, however, a difference in this respect between the liability of a carrier by land and a carrier by sea. Damages for loss of market caused by accident or delay at sea have been held to be too remote to be recovered.[6]

*Non-delivery of Stock.*—In this and some other actions the precise amount of the damages depends on the date at which the stock ought to have been and was not delivered. So, in an action for breach of a contract to replace stock lent, the measure of damages is the price of the stock on the day when it ought to have been replaced, or its price on the day of the

[1] *Conquest* v. *Ebbetts*, [1896] A. C. 490; but see *Molyneux* v. *Richard*, [1906] 1 Ch. 34.

[2] *Per* Bovill, C. J., in *British Columbia Saw Mill Co.* v. *Nettleship* (1868), L. R. 3 C. P. at p. 506; *Cory* v. *Thames Ironworks, &c., Co.* (1868), L. R. 3 Q. B. 181.

[3] *Rice* v. *Baxendale* (1861), 7 H. & N. 96.

[4] *Per* Cockburn, C. J., in *Simpson* v. *L. & N. W. Ry. Co.* (1876), 1 Q. B. D. at p. 277.

[5] *Per* Mellish, L. J., in *The Parana* (1877), 2 P. D. at p. 121.

[6] *The Parana, suprà; The Notting Hill* (1884), 9 P. D. 105 (approved in *Victorian Railway Commissioners* v. *Coultas* (1888), 11 App. Cas. 222); *Hawes* v. *S. E. Ry. Co.* (1884), 54 L. J. Q. B. 174.

trial, at the plaintiff's option. "The true measure of damages in all these cases is that which will completely indemnify the plaintiff for the breach of the engagement. If the defendant neglect to replace the stock at the day appointed, and the stock afterwards rise in value, the plaintiff can only be indemnified by giving him the price of it at the time of the trial. And it is no answer to say that the defendant may be prejudiced by the plaintiff's delaying to bring his action, for it is his own fault that he does not perform his engagement at the time ; or he may replace it at any time afterwards, so as to avail himself of a rising market."[1] So in an action for not redelivering mining shares, lent to the defendant upon a contract to return them on a given day, the true measure of damages will, if they have not been replaced, be the market price of the shares at the time of the trial.[2]

*Non-delivery of Goods.*—If goods sold be not delivered at the time and place agreed on, and the plaintiff has not yet paid the price, the measure of damage is merely the difference between the contract price and the market value on or about the day of breach ; for the plaintiff is bound to act reasonably, and he might have bought other goods immediately in the open market. If there was a market in which the plaintiff could have purchased similar goods, and no difference is proved between the contract price and the market price on the day of the breach, only nominal damages can be recovered.[3] Where, however, no goods of the kind sold can be procured in the market, the measure of damages is the difference between the contract price *plus* the expenses which would be incurred in preparing the goods for, and taking them to, the market, and the amount which the plaintiff would have realised by the sale of them.[4] Where the prices on the market are falling and the purchaser repudiates the contract, the measure of damages is the difference between the contract price and the market price on the day when the vendors accepted the purchaser's repudiation of the contract.[5] It is otherwise if the refusal is anticipatory only and is not accepted by the other party as a final breach of the contract.[6] Where the purchaser has made a contract for the resale of the goods, and the vendor is aware of this, the purchaser may recover damages for the loss of his profit on such resale, and also in respect of the penalties or other damages for which he is liable to his purchaser, not necessarily to the full extent of his liability over, though the jury may award him the full amount if they deem it reasonable.[7]

[1] *Per* Grose, J., in *Shepherd* v. *Johnson* (1801), 2 East, at p. 212.
[2] *Owen* v. *Routh* (1854), 14 C. B. 327.
[3] *Valpy* v. *Oakeley* (1851), 16 Q. B. 941. See Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51.
[4] *M'Neill* v. *Richards*, [1899] 1 Ir. R. 79 ; *Schulze* v. *G. E. Ry. Co.* (1887), 19 Q. B. D. 30.
[5] *Roth* v. *Taysen* (1896), 73 L. T. 628 ; *Ashmore* v. *Cox*, [1899] 1 Q. B. 436 ; *Braithwaite* v. *Foreign Hardwood Co.*, [1905] 2 K. B. 543.
[6] *Michael* v. *Hart*, [1902] 1 K. B. 482.
[7] *Hydraulic Engineering Co.* v. *McHaffie* (1878), 4 Q. B. D. 670 ; *Elbinger* v. *Armstrong* (1874), L. R. 9 Q. B. 473 ; *Grébert-Borgnis* v. *Nugent* (1885), 15 Q. B. D. 85.

*Not accepting Goods.*—In an action for not accepting goods, the difference between the contract price and the market price on the day the contract was broken is the ordinary measure of damages.[1] Where goods are to be delivered at a certain time, and while on their way the buyer gives notice that he will not accept them, the measure of damages is the difference between the contract price and the market price on the day fixed for the delivery, and not that on the day on which the seller received the notice. The measure of damages for not accepting stock sold is the difference between the contract price and the market price on the day of the breach of contract. The measure of damages in the case of railway or other shares in companies is the difference between the contract price and the market value on the day of breach, or the earliest day afterwards on which they could be sold.

*Railway Cases.*—If a railway company fails to carry a passenger to the destination stated on his ticket, he can claim to be repaid his hotel bill, and the cost of a cab, but not of a special train,[2] but he cannot recover any compensation for the worry and annoyance of the delay, or for illness caused by exposure to the cold.[3]

*Shipping Cases.*—If a ship be ordered to be built, or be left for repairs, and be not delivered by, or repaired within, the time stipulated, the measure of damages is *primâ facie* the sum which would have been earned by the ship in the ordinary course of trade since the period when it should have been delivered.[4] In an action for delay in delivering cargo, the measure of damages is the difference between the market value of the plaintiff's goods at the port of discharge on the date of due delivery and their market value at that port at the date of actual delivery. As a rule damages cannot, in the absence of special circumstances, be given for loss of market on a contract of carriage by sea;[5] but there is no rule of law that such damages can never be recovered.[6] Where some of the packages of tea shipped by the assured were damaged by sea-water, it was held that the assured could only recover for the damage done to these packages, and not for any loss occasioned by injury to the "reputation of the remainder."[7]

*Sale of Land.*—When a person contracts to sell real property, there is an implied understanding that if, without fraud on his part, he fails to make out a good title, the only damages recoverable, over and above the deposit money paid with interest, will be the expenses to which the purchaser may be put in investigating the title. No damages are recoverable by the purchaser for the loss of his bargain in such a case, *i.e.*, in the absence of fraud or misrepresentation on the part of the vendor.

[1] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 50.
[2] *Le Blanche* v. *L. & N. W. Ry. Co.* (1876), 1 C. P. D. 286.
[3] *Hamlin* v. *G. N. Ry. Co.* (1856), 1 H. & N. 408; *Hobbs* v. *L. & S. W. Ry. Co.* (1875), L. R. 10 Q. B. 111.
[4] *The Argentino* (1889), 14 App. Cas. 519; *Welch* v. *Anderson* (1892), 61 L. J. Q. B. 167.
[5] *The Parana* (1877), 2 P. D. 118; *The Notting Hill* (1884), 9 P. D. 105.
[6] *Dunn* v. *Bucknall Brothers*, [1902] 2 K. B. 614.
[7] *Cator* v. *Great Western Insurance Co. of New York* (1873), L. R. 8 C. P. 552.

Upon this point *Flureau* v. *Thornhill*[1] and *Bain* v. *Fothergill*[2] are leading authorities. "It is recognised on all hands that the purchaser knows, on his part, that there must be some degree of uncertainty as to whether, with all the complications of our law, a good title can be effectively made by his vendor; and taking the property with that knowledge, he is not to be held entitled to recover any loss on the bargain he may have made, if in effect it should turn out that the vendor is incapable of completing his contract in consequence of his defective title. All that he is entitled to is the expense he may have been put to in investigating the matter."[3]

"If a person enters into a contract for the sale of a real estate knowing that he has no title to it nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit."[4] But where the vendor can give a good title, but refuses or knowingly omits to perform his part of the contract, the rule does not apply.[5]

Moreover, "under ordinary circumstances, where the purchaser fails to complete without any default on the part of the vendor, the latter is entitled to recover all the expenses he has incurred in preparing for the sale and also the loss incurred upon a resale, that is, the difference of price, if any."[6] Where a lessee assigns in spite of his covenant not to do so, the measure of damages is such sum as represents the difference in value to the lessor of the liability of the assignor and assignee respectively.[7]

*Wrongful Dismissal.*—The measure of damages in actions for wrongful dismissal depends partly upon the rate of wages to which the plaintiff was entitled under his agreement with the defendant, and partly upon the length of time which will probably elapse before the plaintiff can obtain similar employment on equally advantageous terms. It is the duty of a servant who is wrongfully dismissed to use all reasonable diligence in seeking another post. If, indeed, the particular employment could not be again obtained without delay, and if the wages stipulated for in the contract broken were higher than usual, the damages should be such as to indemnify for the loss of wages during that delay, and for the loss of the excess of the wages contracted for above the usual rate; but no allowance would be made for any pain caused to the plaintiff by his dismissal in consequence of his being attached to the place of his employment.[8]

[1] (1776), 2 W. Bl. 1078. This case "establishes that where there is no fraud and no express contract to sell property with a knowledge on the vendor's part that he has not the title to sell . . . no damages for loss of bargain can be recovered:" *per* Cleasby, B., in *Bain* v. *Fothergill* (1870), L. R. 6 Ex. 69. *Flureau* v. *Thornhill* is distinguished in *Wall* v. *City of London Real Property Co.* (1874), L. R. 9 Q. B. 249, 252.

[2] (1873), L. R. 7 H. L. 158; *Morgan* v. *Russell*, [1909] 1 K. B. 357.

[3] *Per* Lord Hatherley in *Bain* v. *Fothergill* (1873), L. R. 7 H. L. at pp. 210, 211.

[4] *Per* Lord Chelmsford, *Ib.* at p. 207.

[5] *Engell* v. *Fitch* (1869), L. R. 4 Q. B. 659.

[6] *Per* Brett, J., in *Essex* v. *Daniell* (1875), L. R. 10 C. P. at p. 553.

[7] *Williams* v. *Earle* (1868), L. R. 3 Q. B. 739.

[8] See the remarks of Erle, J., in *Beckham* v. *Drake* (1849), 2 H. L. Cas. at p. 606,

If the plaintiff is likely to obtain another similar situation without delay, the damages should be small; if he has actually obtained one, they should be merely nominal.[1]

In an action of contract brought for a liquidated amount, *i.e.*, for a sum certain or capable of being reduced to a certainty, the amount to be awarded to the plaintiff is purely a matter of calculation, and can be arrived at by mere arithmetic, or by reference to a scale of charges or some other accepted rate or percentage. Sometimes, moreover, the law itself defines the mode of computing the amount recoverable in an action, as, for instance, where the plaintiff sues his co-contractors for contribution, or where the claim is for general average.[2] "The amount which would have been received if the contract had been kept is the measure of damages if it be broken."[3]

But, as we have already stated, the measure of damages in an action of contract may be affected by the stipulations into which the parties have expressly entered. Thus, the parties may agree that they shall only be liable in certain events.[4] Most frequently, however, the parties have named in their contract a certain sum which is to be paid in the event of its being broken. Where this is the case, a question arises which is often of some difficulty, viz.: Do the parties really regard the sum so named as a fair and proper compensation for a breach of the contract, or is it merely a prohibitory figure, which will not be exacted in the case of every breach? This question is usually expressed thus in legal language: Is the sum named liquidated damages, or is it a penalty? By "liquidated damages" is meant the sum which the parties to a contract have themselves agreed on as the damages which would be a fair compensation for a breach of it, whereas a "penalty" is the sum named in a contract to secure its due

[1] See the remarks of Crompton, J., in *Emmens* v. *Elderton* (1853), 13 C. B. at p. 508; and see *Macdonnell* v. *Marston* (1884), C. & E. 281.

[2] See *Hallett* v. *Wigram* (1850), 9 C. B. 580; *Atkinson* v. *Stephens* (1852), 7 Exch. 567.

[3] *Per* De Grey, C. J., in *Sharpe* v. *Brice* (1774), 2 W. Bl. at p. 942.

[4] Where there is a statutory duty to enter into contracts, *e.g.*, to carry passengers on a tramway, the persons on whom that duty falls can only limit their liability by giving an option to the passengers to travel at one rate at their own risk, and at another at the carriers' risk: *Clarke* v. *West Ham Corporation*, [1909] 2 K. B. 858.

performance, not as an agreed valuation of the probable consequences of its breach, but as an amount to be forfeited on any breach, however great or small the actual loss to the plaintiff may prove to be. Formerly the Courts strictly enforced the penalty, but allowed the defendant by paying the penalty to purchase the right to do the thing which he had promised not to do. Now the tendency of our judges is to restrict the amount to be paid by the defendant to the damage which the plaintiff has in fact sustained, but at the same time, in a proper case, to grant the plaintiff an injunction to restrain any repetition of the act.

The fact that the parties state expressly in their contract that the sum named is liquidated damages, and not a penalty, will not prevent the Court from deciding that it is a penalty.[1] Where the contract contains a variety of stipulations of different importance, and one sum is stated to be payable on breach of performance of any one of them, then, although it be called by the name of liquidated damages, it is in reality a penalty, and the actual damage sustained is alone recoverable.[2] But where the parties name a sum which is to be paid as liquidated damages in one event only, this will be regarded as liquidated damages and not a penalty, and will then bind both parties.

In deciding, however, whether a sum made payable by way of compensation for breach of a contract is to be treated as liquidated damages or as a penalty, the Court must take all the circumstances into consideration, in order to ascertain the intention of the parties. The fact that the sum in question is to be paid on the breach of any one of a variety of stipulations of different degrees of importance does not necessarily oblige the Court to treat it as a penalty, although it raises a presumption that that was the intention of the parties; nor does the fact that the sum in question had been deposited at the making of the contract compel the Court to treat it as liquidated damages, although it forms a material element to be taken into consideration in ascertaining the intention of the parties.[3]

[1] See *Thompson* v. *Hudson* (1869), L. R. 4 H. L. at p. 30; and *Clydebank Engineering and Shipbuilding Co.* v. *Yzquierdo y Castaneda*, [1905] A. C. 6; *Commissioner of Public Works* v. *Hills*, [1906] A. C. 368.

[2] *Magee* v. *Lavell* (1874), L. R. 9 C. P. 107; and see *Jones* v. *Hough* (1879), 5 Ex. D. 115; *Rayner* v. *Rederiaktiebolaget Condor*, [1895] 2 Q. B. 289.

[3] *Pye* v. *British Automobile Syndicate, Ltd.*, [1906] 1 K. B. 425.

Again, in written contracts, whether special or simple, it not infrequently happens that the parties themselves assume to define the precise amount of liability which shall be incurred for breach of contract. If so, and if it appears that the amount thus specified is really intended as liquidated damages, the jury will be relieved from any inquiry as to the amount of compensation; the judge will direct them to find the precise sum agreed upon and stipulated to be paid by the parties. "The cases upon the subject of penalty or liquidated damages are very numerous. The result of them seems to be this, that what the Courts look at is the real intention of the parties as it is to be gathered from the language they have used."[1]

Where, however, the judge is satisfied that the parties intended the sum named in their contract to be payable by way of penalty only, he will require evidence to be given as to the loss which the plaintiff has in fact sustained, and will direct the jury to restrict their verdict to the amount of such loss. They cannot, however, award the plaintiff a larger sum than the stipulated penalty. "Where the deed contains several stipulations of various degrees of importance, as to some of which the damages might be considered liquidated, whilst for others they might be deemed unliquidated, and a sum of money is made payable upon a breach of any of them, the Courts have held it to be a penalty only, and not liquidated damages. But where the damage is altogether uncertain, and yet a definite sum of money is expressly made payable in respect of it by way of liquidated damages, those words must be read in their ordinary sense and cannot be construed to import a penalty."[2] "I understand a penalty to be something which a debtor is to pay, over and above his original liability, as a punishment."[3]

It does not matter that the parties have expressly declared the sum named to be liquidated damages, if the Court can see that it really is a penalty. This is illustrated by the decision in *Kemble* v. *Farren*.[4] In this

[1] *Per* Keating, J., in *Lea* v. *Whitaker* (1872), L. R. 8 C. P. at p. 73; and see *Magee* v. *Lavell* (1874), L. R. 9 C. P. 107, 115.

[2] *Per* Alderson, B., in *Price* v. *Green* (1845), 13 M. & W. at pp. 701, 702.

[3] *Per* Lush, L. J., in *Ex parte Burden* (1881), 16 Ch. D. at p. 680; and see *Protector Loan Co.* v. *Grice* (1880), 5 Q. B. D. 592.

[4] (1829), 6 Bing. 141; and see *Thompson* v. *Hudson* (1869), L. R. 4 H. L. 1, 30 *Beckham* v. *Drake* (1849), 2 H. L. Cas. 579, 598, 614.

case the defendant had agreed to perform as an actor at the plaintiff's theatre during several consecutive seasons. The agreement contained various clauses and stipulations, amongst others that the defendant should perform, that the plaintiff should pay him so much on every night that the theatre was open for theatrical performances during the time in question, and that if either of the parties should neglect or refuse to fulfil the said agreement or any stipulation in it he should pay to the other the sum of £1,000 as liquidated and ascertained damages, not as a penalty. Notwithstanding this express declaration, the Court held that the amount specified was a penalty merely, and not liquidated damages, on the ground that if an agreement contains clauses, some sounding in uncertain damages and others in pecuniary payments of fixed amount, and the action is brought for the breach of a clause of an uncertain nature, it would be absurd to construe the sum specified in the agreement as liquidated damages, because a very large sum might thus become immediately payable in consequence of the non-payment of a very small one, such a case being precisely one in which Courts of equity have always given relief. But where the defendant had contracted not to practise as a perfumer within a certain district, and for the observance of this contract bound himself to the plaintiff in the sum of £5,000, "as and by way of liquidated damages, and not of penalty," it was held that the decision in *Kemble* v. *Farren* did not apply.[1]

The whole question as to the distinction between a penalty and liquidated damages has been since dealt with by the Court of Appeal in the case of *Wallis* v. *Smith*,[2] where the former decisions are reviewed and commented on. Jessel, M. R., in delivering judgment, divides the cases into four classes:—

1. Where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations, all or some of which are, or one of which is, for the payment of a sum of money of less amount, that is really a penalty, and only the actual damage can be recovered. The Court will not in such cases sever the stipulations, and if any one of them is for the payment of a sum of money of less amount, the proviso will be bad.[3]

2. Where the amount of damages is not ascertainable *per se*, but where the amount of damages for a breach of one or more of the stipulations either must, or in all human probability will, be small, so that the Court can assume it to be

[1] *Price* v. *Green* (1845), 13 M. & W. 695; (1847), 16 M & W. 346.
[2] (1882), 21 Ch. D. 243, 256 *et seq.*
[3] See *Elphinstone* v. *Monkland, &c., Co.* (1886), 11 App. Cas. 332.

small, in this case there is no express decision whether or not the same rule applies as in the first case, though there are *dicta* on both sides. It probably will do so where some of the covenants are of such a character that obviously the damage which can possibly arise from any breach of them would be very insignificant compared with the sum which has been fixed by the parties.

3. Where the damages for the breach of each stipulation are unascertainable or not readily ascertainable, but the stipulations may be of greater or less importance or of equal importance, there, though there are *dicta* to the contrary, the rule to be collected from the decisions is, that though the stipulations vary in importance, the sum is not treated as a penalty, but as liquidated damages.

4. Where a deposit is to be forfeited for the breach of a number of stipulations some of which may be trifling, some of which may be for the payment of money on a given day, here too the sum will be treated, not as a penalty, but as liquidated damages. "One rule which appears to be recognised in the cases as a canon of construction with regard to agreements of this kind is that where the parties to a contract have agreed that, in case of one of the parties doing or omitting to do some one thing, he shall pay a specific sum to the other as damages, as a general rule such sum is to be regarded by the Court as liquidated damages, and not a penalty."[1] An exception to such rule is where a larger sum is to be payable upon the non-payment of a smaller one. A further exception is suggested where the sum agreed to be paid is so large with respect to the matter in respect of which it is to become payable as to render the contention that it should be regarded as liquidated damages absurd.

## VI. Aggravation and Mitigation of Damages.

Where the damages are liquidated, the jury will not be allowed to take into their consideration extraneous matter, such as the motives or conduct of either party.

[1] *Per* Lord Esher, M. R., in *Law* v. *Local Board of Redditch*, [1892] 1 Q. B. at p. 130.

But the case is different when the damages are unliquidated. Then, whether the action be of tort or of contract, the plaintiff is generally allowed to travel outside the bare facts which constitute his strict cause of action, and to prove extraneous matters to enhance the damages.

In the first place, the plaintiff may prove every loss which he has actually sustained, and all expense which he has reasonably incurred, in consequence of the defendant's tort or breach of contract. Thus, in an action for breach of promise of marriage, the plaintiff may show in aggravation of damages that the defendant seduced her under the cover of the promise of marriage.[1] So, if a cattle-dealer sells a diseased cow to a farmer, he is liable for the value, not only of that cow, but also of all other cows that catch the disease from it; and this is so whether the farmer sues in contract for breach of warranty or in tort for a misrepresentation.[2] Where a lessee had, in breach of his covenant, assigned without his lessor's consent to a person who, as the lessee knew, intended to use, and did in fact use, the premises as a turpentine distillery, and the premises were burnt down by a fire arising from such use, he was held liable to pay to the lessor by way of damages for his breach the amount of the damage done by the fire.[3]

Moreover, in certain cases, as we have seen,[4] the jury is permitted to award the plaintiff damages in excess of the amount which would be adequate compensation for any loss which he has in fact sustained. These are called vindictive or exemplary damages, because the jury desires not merely to recoup the plaintiff, but also to punish the defendant by fining him for his misconduct.

Thus, where a member of Parliament persisted in shooting on the plaintiff's land and used insolent language, a verdict for £500 was held not to be excessive, though he had done no real damage.[5] So in cases of malicious

[1] *Berry* v. *Da Costa* (1866), L. R. 1 C. P. 331; *Millington* v. *Loring* (1880), 6 Q. B. D. 190.
[2] *Mullett* v. *Mason* (1866), L. R. 1 C. P. 559; *Smith* v. *Green* (1875), 1 C. P. D. 92; and see *Papè* v. *Westacott*, [1894] 1 Q. B. 272.
[3] *Lepla* v. *Rogers*, [1893] 1 Q. B. 31.
[4] *Ante*, pp. 1273, 1281.
[5] *Merest* v. *Harvey* (1814), 5 Taunt. 442.

prosecution,[1] and in actions of libel and slander, "the damages are not limited to the amount of pecuniary loss which the plaintiff is able to prove."[2] The fact that the defendant acted spitefully and maliciously is allowed to enhance the damages. The plaintiff may give in evidence for this purpose all the circumstances preceding and attending the publication,[3] and any previous transactions between himself and the defendant which have any direct bearing on the matter. The jury will also consider the fact that the attack was entirely unprovoked, that the defendant could easily have ascertained that the charge he made was false, and that he continued to circulate the libel after complaint was made to him.[4] "The jury, in assessing damages, are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before action, after action, and in Court during the trial."[5]

As a rule, where the damages are liquidated, it is not open to the defendant to give evidence in mitigation of damages. In an action for work and labour done, however, the defendant may if he thinks fit give evidence, in abatement of the claim, that certain portions of the work ordered were badly done, or not done at all.[6] But in all these cases the defendant will only be allowed to show the extent to which the value of the goods or work is diminished by reason of their not being in accordance with the contract; he cannot prove, in reduction of price, consequential damages which arise from the breach of contract, but do not affect the value of the plaintiff's goods or work. For such damages he must specifically counterclaim or bring a cross-action.[7]

But in actions in which the damages are unliquidated, whether actions of contract or of tort, many other considerations are allowed to affect the minds of the jury, and may be urged on them in mitigation of damages. These matters may be roughly grouped under five heads:—

1. That the plaintiff has not in fact suffered the damage

[1] *Hewlett* v. *Cruchley* (1813), 5 Taunt. 277; *Leith* v. *Pope* (1780), 2 W. Bl. 1327.

[2] *Per cur.* in *Davis* v. *Shepstone* (1887), 11 App. Cas. at p. 191.

[3] *Whittaker* v. *Scarborough Post*, [1896] 2 Q. B. 148.

[4] *Adams* v. *Coleridge* (1884), 1 Times L. R. 84.

[5] *Per* Lord Esher, M. R., in *Praed* v. *Graham* (1889), 24 Q. B. D. at p. 55.

[6] *Davis* v. *Hedges* (1871), L. R. 6 Q. B. 687.

[7] *Mondel* v. *Steel* (1841), 8 M. & W. 858; *Rigge* v. *Burbidge* (1846), 15 M. & W. 598; and see *Street* v. *Blay* (1831), 2 B. & Ad. 456; *Poulton* v. *Lattimore* (1829), 9 B. & C. 259.

which he alleges. The burden lies on the plaintiff of proving all special damage. The defendant generally endeavours by cross-examination or otherwise to controvert or minimise such a claim; he often contends that portions of the damage claimed are in law remote; and sometimes succeeds in showing that certain damage, which the plaintiff has undoubtedly suffered, was not the consequence of any act or default on his part, but was due to some extraneous or accidental cause, *e.g.*, the act of a third person [1] or even the unreasonable failure of the plaintiff to avert the consequences of the defendant's act.[2]

2. The conduct of the plaintiff in the litigation, or in the events which led up to and caused the litigation, is generally admissible in mitigation of damages. Thus if the defendant can show that the action is not brought genuinely with the object of recovering reasonable compensation, but is brought to levy blackmail on the defendant, or for some political motive, or to assist someone else to bring another action hereafter, or to advertise the plaintiff's goods, or in some other way to gratify the personal vanity or spite of the plaintiff, the jury will award but small damages; for they will regard the action as one that ought never to have been brought. So if the plaintiff has himself attacked the defendant and provoked him to commit the assault or to publish the libel complained of, or otherwise invited or challenged the commission of the act for which he now claims damages.[3] Again, if the plaintiff has asserted his rights harshly or with undue severity, if he acted indiscreetly or unbecomingly in the matters which led up to and brought about the litigation, these circumstances will tend to mitigate the damages, *e.g.*, where the plaintiff has by his own innocent but foolish conduct subjected himself and others to misconception.[4]

3. Evidence of the plaintiff's general bad character—*i.e.*, in matters unconnected with the litigation—is, as a rule,

[1] *Harrison* v. *Pearce* (1858), 1 F. & F. 567; and see *Wyatt* v. *Gore* (1816), Holt, N. P. 299; *Peruvian Guano Co.* v. *Dreyfus*, [1892] A. C. 166.

[2] *Grant* v. *Owners of S.S. Egyptian*, [1910] A. C. 400; *The Bruxellesville*, [1908] P. 312.

[3] *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 698; *O'Connor* v. *The Star Newspaper Co., Ltd.* (1893), 68 L. T. 146.

[4] *Davis* v. *Duncan* (1874), L. R. 9 C. P. 396; and *Harnett* v. *Vise* (1880) 5 Ex. D. 307.

inadmissible. If the defendant owes the plaintiff £500, the plaintiff is entitled to recover that amount, whether his private character be good or bad.

There is an exception, however, in the case of actions of defamation where the plaintiff is seeking compensation for injury to his reputation. Here, even though the defendant does not venture to justify, he is allowed, under certain restrictions, to give evidence of the plaintiff's general bad character in mitigation of damages.[1] Only general evidence of the plaintiff's bad character may be given with this object; the defendant may not go into particular instances: still less may he prove the existence of a general report or rumour that the plaintiff had been guilty of the alleged or any similar misconduct.[2] Such evidence cannot be given at the trial without the leave of the judge, unless the defendant has justified, or unless, seven days at least before the trial, he has given the plaintiff particulars under Order XXXVI., r. 37,[3] of the matters which the defendant intends to prove.

This rule, however, in no way restricts the right of cross-examination; in every action, if the plaintiff goes into the witness-box, he may be cross-examined "to credit" on every detail of his previous life which can conceivably affect his credit. But, unless such details are relevant to the issue, the defendant must accept the plaintiff's answer; he cannot call evidence in chief to contradict it.

4. The conduct of the defendant may also be relevant. If the defendant acted honestly, though tortiously, on a reasonable suspicion, or under a mistaken impression as to his rights or as to the facts, the jury will naturally[4] award less damages against him than if he acted fraudulently, maliciously or deliberately. For this purpose the defendant may generally show "the surrounding circumstances" which induced him to act as he did. The absence of all malice ought to tell in the defendant's favour. So, too, the defendant's subsequent conduct may tend to mitigate the damages, *e.g.*, if he has shown himself open to argument, has listened to any explanations offered him, has restored the goods which he removed, has expressed regret or apologised for his mistake, has stopped the sale of any book or paper complained of, and done all in

[1] *Wood* v. *Earl of Durham* (1888), 21 Q. B. D. 501.
[2] *Scott* v. *Sampson* (1882), 8 Q. B. D. 491; *Mangena* v. *Wright*, [1909] 2 K. B. 958.
[3] The defendant is entitled to administer interrogatories to the plaintiff as to the matters referred to in such particulars: *Scaife* v. *Kemp & Co.*, [1892] 2 Q. B. 319.
[4] Though perhaps illogically; see *ante*, p 1276.

his power to remedy or reduce the mischief caused by his act.[1]

5. The words and conduct of third persons are, as a general rule, inadmissible, even in mitigation of damages, except when such evidence is necessary to explain the conduct of the parties to the action in the course of, or in the circumstances leading up to, the litigation.

Thus the fact that other persons besides the defendant have on other occasions uttered the same slander as he did is inadmissible. But if the defendant heard the slander from A., and believed it to be true, and, when repeating it, named A. as his informant, then these facts may be given in evidence in mitigation of damages, for they place the defendant's act in a better light.[2] The fact that other persons who were similarly slandered on the same occasion have accepted an apology from the defendant and not brought actions is not admissible in evidence in an action brought by the plaintiff, especially if no apology was offered to him.[3] That the plaintiff might have, but has not, brought other actions for similar wrongs is wholly immaterial. He may sue whom he pleases, and when he pleases. Thus in an action of libel, evidence that others had previously published similar libels on the plaintiff and have not been sued is not admissible. It is no justification for the defendant's republication ; still less is it any evidence of the truth of such charges.[4] It is wholly immaterial that the plaintiff omitted to contradict or complain of such previous publications.[5] But this is only admissible as showing that the defendant acted innocently and without malice ; it comes really under head 4 above.[6] And, generally, if the present defendant is liable, the fact that someone else is liable to be sued in another action for a similar wrong is not only no defence to the present action : it is not admissible even in reduction of damages. Evidence that such other actions have in fact been brought was also inadmissible for every purpose at common law. But now "at the trial of an action for a libel contained in any newspaper the defendant shall be at liberty to give in evidence in mitigation of damages that the plaintiff has already recovered, or has brought actions for, damages, or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought." [7]

[1] See *Gathercole* v. *Miall* (1846), 15 M. & W. 319 ; *Smith* v. *Scott* (1847), 2 Car. & K. 580 ; *Davis* v. *Cutbush* (1859), 1 F. & F. 487 ; *Harle* v. *Catherall* (1866), 14 L. T. 801, *Praed* v. *Graham* (1889), 24 Q. B. D. at p. 55. As to an apology in actions of defamation, see Odgers on Libel and Slander, 4th ed., pp. 378—381.

[2] *Tidman* v. *Ainslie* (1854), 10 Exch. 63 ; and see *Wyatt* v. *Gore* (1816), Holt, N. P. 303.

[3] *Tait* v. *Beggs*, [1905] 2 Ir. R. 525.

[4] *R.* v. *Newman* (1853), 1 E. & B. 268.

[5] *R.* v. *Holt* (1793), 5 T. R. 436 ; *Pankhurst* v. *Hamilton* (1886), 2 Times L. R. 682 ; and see the remarks of Maule, J., in *Ingram* v. *Lawson* (1839), 9 C. & P. at p. 333.

[6] See *Hunt* v. *Algar* (1833), 6 C. & P. 245 ; *Creevy* v. *Carr* (1835), 7 C. & P. 64 ; *Davis* v. *Cutbush* (1859), 1 F. & F. 487.

[7] Law of Libel Amendment Act, 1888 (51 & 52 Vict. c. 64), s. 6.

## Chapter XXII.

### Proceedings after Judgment.

### No Second Action.

A judgment finally disposes of all controversy as to any of the matters in issue in the action. The rights of the parties as to any such matter depend in future wholly on the judgment. As long as that judgment stands,[1] none of the issues raised in the action can be re-tried. The judgment not only defines the rights of the parties; it also modifies them. The plaintiff's original cause of action, whether of contract or of tort, disappears; if he has failed, it is barred; if he has won, it is merged in a judgment debt: *transit in rem judicatam*. Hence no second action can be brought on the same cause of action, even though in the first action the plaintiff by a mistake claimed too small a sum.[2] But it must be clear that the cause of action is the same in both cases.[3] "The principle is, that where there is but one cause of action, damages must be assessed once for all."[4]

But it is necessary to distinguish carefully between a complete cause of action which may yet produce fresh damage in the future and a continuing cause of action from which continuous damage steadily flows. The plaintiff may be injured in a railway accident, and recover substantial damages from the company, and subsequently disease of the brain or of the spine may develop which is solely due to the accident. He cannot bring a second action, or claim further damages in the first action. But where the cause of action is a continuing one (as, for instance, an action for breach of covenant by a

[1] *Boaler* v. *Power*, [1910] 2 K. B. 229. An action may be brought to set aside a judgment obtained by fraud, but the evidence of fraud must be conclusive.
[2] *Sandars* v. *Hamilton* (1907), 23 Times L. R. 389.
[3] *Serrao* v. *Noel* (1885), 15 Q. B. D. 549.
[4] *Per* Bowen, L. J., in *Serrao* v. *Noel*, *suprà*, at p. 559.

master to teach his apprentice, or breach of covenant to keep premises in repair, or for a continuing trespass), a fresh cause of action arises every day that such breach or injury continues.[1] By Order XXXVI., r. 58, "Where damages are to be assessed in respect of any continuing cause of action, they should be assessed down to the time of the assessment." Should the act or omission complained of be repeated after the assessment, it is open to the plaintiff to bring a fresh action.

But where the act or omission complained of in the action happened once and has not been repeated (*e.g.*, where the defendant has committed one isolated breach of contract, or has published one libel[2] or struck the plaintiff one blow), there, as we have seen, the cause of action is not continuing, and the jury must assess the damages once for all; and no fresh action can, as a rule, be brought for any subsequent damage that may hereafter arise from that act or omission.[3]

To this rule there is one (somewhat doubtful) exception, in cases where special damage is essential to the cause of action. In such cases the jury should strictly confine their consideration to such special damage as is specifically alleged and proved in the action before them. Hence it would seem to follow that if any fresh damage arose in the future, that would constitute a fresh ground of action, because it was not included in the first. And North, C. J., was of this opinion in *Lord Townshend* v. *Hughes*.[4] But Lord Holt is reported as saying the contrary in *Fitter* v. *Veal*,[5] though the *dictum* is not to be found in other reports of the same case.[6] The question was much discussed in *Darley Main Colliery Co.* v. *Mitchell*;[7] and Lord Blackburn unfortunately differed from Lord Bramwell.[8] However, after the decision in that case, and in *Crumbie* v. *Wallsend Local Board*,[9] the better opinion is that a second action will lie for fresh special damage in cases where special damage is part of the cause of action.

[1] *Coward* v. *Gregory* (1866), L. R. 2 C. P. 153; *Hole* v. *Chard Union*, [1894] 1 Ch. 293.
[2] *Macdougall* v. *Knight* (1890), 25 Q. B. D. 1.
[3] *Brunsden* v. *Humphrey* (1884), 14 Q. B. D. 141; and see *Kitchen* v. *Campbell* (1772), 3 Wils. 304.
[4] (1676), 2 Mod. 159.
[5] (1701), 12 Mod. 542.
[6] 1 Lord Raymond, 339, 692, and 1 Salk. 11; and see Bull. N. P. 7.
[7] (1886), 11 App. Cas. 127.
[8] *Ib.* at pp. 143, 145.
[9] [1891] 1 Q. B. 503; and see *West Leigh Colliery Co.* v. *Tunnicliffe*, [1908] A. C. 27.

## Execution.

The simplest form of a judgment is "that the defendant do pay the plaintiff £ ——;" it is not usual to specify any time within which payment must be made; and in the absence of such a limitation the unsuccessful party can be called upon to pay the money forthwith. The judgment creditor is naturally anxious to obtain the fruits of his victory as speedily as he may; hence, as a rule, he promptly proceeds to enforce the judgment which he has obtained. The process by which a judgment of the Court is enforced is called "execution." It is generally effected by a writ directed to the sheriff or other proper person, commanding him to take compulsory proceedings for the purpose of carrying into effect the judgment of the Court. There are several such writs; and it is impossible to describe them here in detail. Thus the successful party may sue out a writ either of *fieri facias* or *elegit* under Order XLIII., or in some cases he can apply for equitable execution by means of a receiver. If he knows of anyone who owes money to the judgment debtor, he can proceed to attach the debt under Order XLV.[1] If the judgment debtor be a beneficed clerk, the profits of the living may be sequestered under rules 3 and 4 of Order XLIII. Imprisonment for debt is abolished; but a judgment debtor who can pay, and will not, may be committed to prison for six weeks;[2] such imprisonment does not extinguish the debt.

The most ordinary form of execution is by writ of *fieri facias*. This writ commands the sheriff to *cause to be made* out of the goods and chattels of the judgment debtor the sum recovered by the judgment, together with interest at the rate of £4 per cent., and immediately after the execution of the writ to bring the money and interest before the Court, to be paid to the judgment creditor. By the authority thus given him, the sheriff may enter the house of the execution debtor and seize whatever goods can be found there belonging to the debtor; he must not seize goods which are the property of someone else. He may also enter the house of a third person, if the goods of the debtor be actually therein; but there is always the risk that the house may contain nothing belonging to the debtor, and then the sheriff would be liable to an action of trespass.

[1] See *post*, p. 1320.
[2] Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.

The sheriff may seize and sell all the personal goods and chattels belonging to the execution debtor that he can find, and which can be sold, with the exception of the wearing apparel and bedding of the judgment debtor or his family, and the tools and implements of his trade, provided the value of such excepted articles does not exceed in the whole £5.[1] He can also seize and sell the debtor's choses in action, such as bank notes, cheques, bills of exchange, bonds, and other securities for money.[2] But he may not seize or sell goods which are already in the custody of the law, *e.g.*, goods which the landlord had already distrained for rent in arrear.

A writ of *fieri facias* or other writ of execution binds the property in all goods of the execution debtor which the sheriff is entitled to seize as from the time when the writ is delivered to the sheriff or other officer charged with the enforcement of the execution. It is the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month, and year when he received the same. The title to such goods acquired by any person in good faith and for valuable consideration is not prejudiced by such writ, unless such person had at the time when he acquired his title notice that such writ, or any other writ by virtue of which the goods of the execution debtor might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff.[3]

Under a *fi. fa.*, the sheriff has no power to sell an estate in fee, or for life, or an equitable interest such as an equity of redemption, or things which are fixed to the freehold and which would pass on death to the heir, and not to the executor, of the owner. Moreover, no judgment affects land so as to be a charge on it until it has actually been taken in execution by the sheriff.[4] Hence it is sometimes necessary for the judgment creditor to issue a second writ called a writ of *elegit*, under which the sheriff places the execution creditor in possession of the whole of the debtor's land, which he holds till the judgment is satisfied.

If the plaintiff succeeds in an action for the recovery of land, the judgment will be "that the plaintiff do recover possession of the land in the statement of claim described as ——;" and the plaintiff is entitled at once to a *writ of possession*, bidding the sheriff to enter on the same, and without delay to "cause the plaintiff to have possession of the said land and premises with the appurtenances." A *fi. fa.* for the amount of the mesne profits and costs may be joined in the same writ. One *fi. fa.* only can be issued on a judgment.[5]

If a plaintiff has recovered judgment for the recovery of any property other than land or money, he must wait fourteen days before issuing execution, unless he can obtain special leave to issue it at an earlier date.[6]

[1] 8 & 9 Vict. c. 127, s. 8.

[2] 1 & 2 Vict. c. 110, s. 12. An order charging stock or shares belonging to the judgment debtor may also be applied for under Order XLVI., r. 1.

[3] Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 1.

[4] 27 & 28 Vict. c. 112, ss. 1 and 3, amending 23 & 24 Vict. c. 38. And see 51 & 52 Vict. c. 51.

[5] *Bowles* v. *Baker*, [1910] W. N. 110.

[6] Order XLII., r. 19.

The defendant is allowed this interval in which to comply voluntarily with the order of the Court. If he does not obey the judgment within that period, a *writ of delivery* will issue, as to which see Order XLVIII. Such a judgment may also be enforced by writ of attachment, or writ of sequestration.[1]

In some cases in which execution could not be had at law, equitable relief could be obtained by the appointment of a receiver. This process still continues, and is still called "equitable execution," though "it is not execution, but a substitute for execution."[2] Thus a receiver will be appointed to receive a fund in Court, or a legacy not yet payable, or a share of the proceeds of the sale of land not yet sold. In this way, too, an execution creditor can sometimes secure payment of his debt out of an equity of redemption or any other interest in land which could not be reached by the ordinary process of execution at law.[3] In determining whether it is just and convenient to appoint a receiver by way of equitable execution, the judge will always have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable cost of his appointment.[4] The appointment of such a receiver operates as an injunction to restrain the judgment debtor from himself receiving the moneys, and prevents his dealing with them to the prejudice of the execution creditor.[5]

## Interpleader.

It often happens that when a sheriff seizes goods under an execution some third person intervenes and claims that the goods are his, or that he has a charge on them under a bill of sale or otherwise. In such cases, the sheriff applies to a Master at judges' chambers for protection. He takes out a summons called "an interpleader summons," and serves it on both the claimant and the execution creditor. All three parties then appear before the Master, who generally disposes of the case then and there, if the amount in dispute is not large, and no difficult question of law or fact arises. In other cases, he directs an "issue" to be tried between the claimant and the execution creditor. If the claimant will pay into Court a reasonable amount to abide the event of the issue, the sheriff will be ordered to withdraw from possession

[1] Order XLII., r. 6.
[2] *Per* Bowen, L. J., in *In re Shephard* (1889), 43 Ch. D. at p. 137.
[3] See *Holmes* v. *Millage*, [1893] 1 Q. B. at p. 558; *Harris* v. *Beauchamp*, [1894] 1 Q. B. 801; *Goldschmidt* v. *Oberrheinische Metallwerke*, [1906] 1 K. B. 373.
[4] Order L., r. 15 A.
[5] *In re Marquis of Anglesey*, [1903] 2 Ch. 727.

of the goods; if not, the Master will order so many of the goods to be sold as will realize the amount of the judgment. The procedure on an interpleader summons and issue is now regulated by Order LVII.[1]

### Garnishee Proceedings.

It may be, however, that a judgment creditor, after exhausting the various processes described above, still finds his claim unsatisfied; but he may have discovered that there is a third person, within the jurisdiction of the Court, who owes the judgment debtor money. He may compel payment of that debt to himself towards the satisfaction of his judgment by a process known as "attachment of debts." In order to ascertain what debts are owing to the debtor, it is often necessary to obtain an order for his examination. If the judgment debtor disobeys the order, he is liable to be committed to prison. Either before or after any oral examination of the judgment debtor, the judgment creditor may apply *ex parte* to a Master for an order, which is technically known as a "garnishee order *nisi*." He must be prepared with an affidavit showing that judgment has been recovered, and is still unsatisfied, and to what amount, and that a certain person named, within jurisdiction, owes the judgment debtor money. The Master thereupon may make an order attaching the debt owing or accruing to the judgment debtor from such person (who is henceforth called "the garnishee"), and ordering the garnishee to appear and show cause why he should not pay such debt to the judgment creditor, or so much of it as may suffice to satisfy his claim.[2] This order

[1] This is called "a sheriff's interpleader," to distinguish it from an analogous proceeding called "a stakeholder's interpleader," which has nothing to do with the execution of a judgment. A stakeholder's interpleader arises in this way. An action is sometimes brought against a person to recover money or goods in which he himself claims no interest, but which is claimed by someone besides the plaintiff. It is obviously unjust that the defendant should, under these circumstances, be put to the expense of defending an action in which he has no interest, while, on the other hand, if he pays the debt, or hands over the goods, to the plaintiff, he may expose himself to an action at the suit of the other claimant. Such a defendant is allowed to take out an interpleader summons under Order LVII., on the hearing of which the action will be summarily stopped against the defendant, and the two adverse claimants will be made parties to an interpleader issue, and so fight out the matter between themselves.

[2] Order XLV., r. 1.

should, as a rule, be personally served upon the garnishee; and, as soon as it is served on him, it binds the debt in his hands: he must not after service pay any money to the judgment debtor;[1] the garnishee, on being served, must appear as the order directs, if he wishes to dispute the debt or his liability to be thus garnished. If the garnishee does not appear in obedience to the order *nisi*, or does not dispute his liability, and does not pay into Court forthwith the amount due from him to the judgment debtor, or an amount equal to the judgment debt, the Master may order execution to issue against the garnishee without any previous writ or process, to levy the amount due from him, or so much thereof as may be sufficient to satisfy the judgment debt. If the garnishee appears and disputes his liability, the Master, instead of ordering that execution shall issue, may direct that any issue or question necessary for determining his liability be tried.[2] Payment into Court by, or execution levied on, the garnishee under any such order is a valid discharge to him of his debt to the judgment debtor up to the amount paid or levied, even though such order be subsequently set aside, or the judgment reversed.[3] The debt must be an absolute one, although not necessarily one which is payable immediately.[4] Pensions in respect of past services are attachable unless a statute provides otherwise.[5] The wages of manual workmen are not attachable.

### Attachment of the Debtor.

Where a judgment directs the performance of any specific act other than the payment of money, such as the removal of a nuisance or the production of an account, or requires anyone to abstain from doing anything, it may be enforced by proceedings against the person, and sometimes also the land or goods of the person, involved.[6] Wilful disobedience to a

[1] Order XLV., r. 2; *Edmunds* v. *Edmunds*, [1904] P. 362.
[2] *Ib.*, rr. 3, 4.
[3] *Ib.*, r. 7.
[4] *Tapp* v. *Jones* (1875), L. R. 10 Q. B. 591.
[5] *Lucas* v. *Harris* (1886), 18 Q. B. D. 127; *Crowe* v. *Price* (1889), 22 Q. B. D. 429.
[6] Order XLII., r. 7.

judgment directing any person to do a specific act is a contempt of Court, and is punished by stringent process. A copy of the judgment must first be personally served on that person, indorsed with a special memorandum in the form given in Order XLI., r. 5, unless, indeed, he has already had notice of the judgment and is evading formal service of it.[1] The plaintiff must then wait till the time specified in the judgment for doing the act has elapsed, or, if no such time be specified, till a reasonable time has elapsed. He may then apply for a writ of attachment commanding the sheriff to arrest the person, and bring him before the Court to answer for his contempt. The leave of a judge must be obtained before issuing a writ of attachment; and notice of the application for leave must be given to the party proposed to be attached.[2] The writ cannot be enforced against a defendant who is outside the jurisdiction. The person attached, in general, remains in prison until he has purged his contempt by doing the act required. A judgment for the payment of money into Court may in some cases be enforced by attachment, but more generally by a writ of sequestration.[3] This is a writ directed to certain commissioners, called sequestrators, bidding them enter on the lands of the person in contempt and sequester and receive into their hands the rents and profits of all his real estate, and all his goods and chattels, and to detain them until the contempt is cleared.

### The Court of Appeal.

While the victorious party is thus endeavouring to obtain the fruits of his victory, his defeated opponent, on the other hand, is anxiously considering whether he cannot set aside the judgment signed against him and have judgment entered in his favour, or at least secure a new trial of the action. To obtain either, he must now apply to the Court of Appeal. He can only obtain judgment in his favour by proving that

[1] *Kistler* v. *Tettmar*, [1905] 1 K. B. 39.
[2] Order XLIV., r. 2; *In re Evans*, [1893] 1 Ch. 252.
[3] Order XLII., r. 4.

the judge was wrong on a point of law. He can only, as a rule, obtain a new trial by showing that the judge or the jury took a wholly unreasonable view of the facts. He may ask both for judgment and for a new trial on his notice of motion, if he wishes; and indeed the Court of Appeal may grant him either, whatever the terms of his notice of motion may be.

Every appeal from a final judgment and every motion for a new trial after a final judgment must, except by consent of all parties, be heard by not less than three judges of the Court of Appeal. The application may be granted either absolutely or upon such conditions as may seem equitable. The Court of Appeal has, over any action or matter brought before it on appeal, all the powers, authority and jurisdiction of the High Court. It can order the appellant to give security for the costs of the appeal. It can amend the pleadings, enlarge time, receive fresh evidence,[1] draw inferences of fact, direct issues to be tried, or accounts and inquiries to be taken or made, and generally it has power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require, including any order as to costs. If there was any miscarriage of justice at the trial below, the Court of Appeal may grant a new trial as to so much of the matter as the miscarriage affects, without interfering with the decision on any other question. So, too, the Court may grant a new trial as against one defendant without granting it as to all.

The appellant must give notice in writing of his intention to appeal to all parties, or at all events to all who will be affected by it. He must serve this notice within fourteen days at least before he can make his motion. If the action was tried by a jury, and the notice of motion asks for a new trial, it must be served within ten days after the trial or further consideration.[2] If the action was tried by a jury, but the notice of motion does not ask for a new trial, or if the action was tried without a jury, it must be served within three months from the time when judgment in the action is signed, entered, or otherwise perfected.[3] The notice must state the grounds of the application, and whether all or part, and what part, of the findings is complained of.[4] It is not enough for the appellant merely to say that he complains of "misdirection"; the notice must state how and in what manner he contends that the jury were misdirected.

[1] *Sanders* v. *Sanders* (1881), 19 Ch. D. 373, 381. But such evidence will not be received, if it could have been given in the Court below had due diligence been observed: *Evans* v. *Benyon* (1887), 37 Ch. D. 329, 345; *The St. Paul*, [1909] P. 43; and see *post*, p. 1327.

[2] Order XXXIX., r. 4; see *Karno* v. *Spratt*, [1909] W. N. 251.

[3] Order LVIII., r. 15. Vacation time is not reckoned in computing the time for serving the notice of motion: Order XXXIX., r. 4. As to the Mayor's Court practice, see *Milch* v. *Frankau & Co., Ltd.* (1909), 100 L. T. 1002.

[4] Order XXXIX., r. 3.

The appellant usually moves to set aside a final judgment on the ground that there was no evidence to go to the jury on some material issue which has been found against him; this, as we have seen,[1] is a question of law for the judge. Or he may contend that on the findings as entered the judgment directed against him is wrong; this also is a matter of law.

(i.) On the other hand, he most frequently asks for a new trial on the ground that the verdict was against the weight of evidence; this clearly is a question of fact. An appeal on a matter of law has, as a rule, a greater chance of success than an appeal on any question of fact. If matters of fact only are involved, the judges of the Court of Appeal are naturally very reluctant to disturb the finding of the judge or jury below, who saw the witnesses, and had the opportunity of judging of their demeanour in the box.[2] Where the action was tried by a judge without a jury, the Court of Appeal will start with the presumption that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, the decision will be reversed; if the matter is left in doubt, the Court of Appeal will not alter the decision of the Court below.[3] And where the action was tried by a judge with a jury, it is still more difficult to disturb an adverse finding of fact. If there was any evidence to go to the jury on that issue, and no misdirection on any point of law, the Court will not, as a rule, set aside the finding, unless it be such as twelve reasonable men could not honestly have found on the evidence before them. "The verdict ought not to be disturbed unless it was one which a jury, viewing the whole of the evidence reasonably, could not properly find."[4] "If reasonable men might find the verdict which has been found, I think no Court has jurisdiction to

[1] *Ante*, p. 1267.

[2] See the remarks of Cozens-Hardy, M. R., in *In re Wagstaff* (1908), 98 L. T. at p. 151.

[3] *Colonial Securities Trust Co.* v. *Massey*, [1896] 1 Q. B. 38; *Coghlan* v. *Cumberland*, [1898] 1 Ch. 704; *Cox* v. *English, &c., Bank*, [1905] A. C. 168.

[4] *Per* Lord Herschell, L. C., in *Metropolitan Ry. Co.* v. *Wright* (1886), 11 App. Cas. at p. 154; and see the remarks of Lord Davey in *Cox* v. *English, &c., Bank*, [1905] A. C. at p. 170.

disturb a decision of fact which the law has confided to juries, not to judges."[1] Wherever there is evidence on both sides fit to be submitted to a jury, it is for the jury, not the Court, to decide the issue; and the verdict once given must stand.[2]

Hence it is generally safer to rely on a point of law. But it must be a point of law which was raised at the trial below, unless the appellant was taken by surprise or there are other special circumstances which excuse the omission.[3] If either party at the trial deliberately elects to fight one question only on which he is beaten, he cannot afterwards on appeal raise another question, although that question was at the trial open to him on the pleadings and on the evidence.[4] But it is the duty of every Court to prevent any abuse of its process; hence the Court may at any stage of the proceeding raise of its own motion the question of the illegality of the contract sued on, although the point had not been raised in the argument before it.[5]

(ii.) An application for a new trial may also be made on the ground that the judge misdirected the jury or that he improperly received or rejected evidence; but it will not be granted on either of these grounds unless some substantial wrong or miscarriage has been thereby occasioned in the trial.[6]

A new trial may also be granted in any of the following cases:—

(iii.) If the judge who tried the case was disqualified by reason of pecuniary interest in the subject-matter before the Court.

(iv.) If any officer of the Court, or the jury, or the successful party, was guilty of misconduct which prevented

[1] *Per* Lord Halsbury, 11 App. Cas. at p. 156.
[2] *Commissioner for Railways* v. *Brown* (1887), 13 App. Cas. 133; *Spencer* v. *Jones* (1897), 13 Times L. R. 174; *Jones* v. *Spencer* (1897), 77 L. T. 536.
[3] *Clouston & Co.* v. *Corry*, [1906] A. C. 122.
[4] *Martin* v. *G. N. Ry. Co.* (1855), 16 C. B. 179, approved in *Browne* v. *Dunn* (1893), 6 R. 67.
[5] *Connolly* v. *Consumers' Cordage Co.* (1903), 89 L. T. 347.
[6] Order XXXIX., r. 6; *Anthony* v. *Halstead* (1877), 37 L. T. 433; *Bray* v. *Ford*, [1896] A. C. 44; *Tait* v. *Beggs*, [1905] 2 Ir. R. 525; *Floyd* v. *Gibson* (1909), 100 L. T. 761.

the other party having a fair trial, *e.g.*, where the respondent fraudulently contrived to keep away from Court a necessary witness for the appellant.

(v.) If the damages awarded by the jury be glaringly excessive, or palpably insufficient.

Where the damages are unliquidated, the Court seldom grants a new trial on the ground that the amount awarded by the jury is either too small or too great. "The assessment of damages is peculiarly the province of the jury."[1] The Court will not grant a new trial on the ground of excessive damages, unless it thinks that, having regard to all the circumstances, the damages are so large that no jury could reasonably have given them.[2] But a new trial will be granted if the Court comes to the conclusion that the judge misdirected the jury as to the damages, or that the jury applied a wrong measure of damages, or must have taken into consideration matters which they ought not to have considered.[3] The Court of Appeal, on an application for a new trial, has no power, without the consent of both parties, to alter the amount of damages awarded by the jury.[4]

Still rarer are the cases in which a new trial has been granted on the ground that the amount of the verdict is too small.[5] The rule is that where there has been no misconduct on the part of the jury, no error in the calculation of figures, and no mistake in law on the part of the judge, a new trial will not be granted.[6] That the jury intended their verdict to carry costs, but have returned an amount insufficient in law to do so, never was a ground for granting a new trial.[7] But a new trial will be granted if it can be shown that the jury wholly omitted to consider some substantial element of damage which they ought to have taken into their consideration.[8]

(vi.) If the verdict was obtained by "surprise." Surprise is the term used to cover cases in which either party has been prevented from having a fair trial through no fault of his own, *e.g.*, if the case was unexpectedly called on when he was reasonably absent, or took a wholly unexpected turn which could not reasonably have been anticipated.

[1] *Per cur.* in *Davis* v. *Shepstone* (1886), 11 App. Cas. at p. 191.
[2] *Praed* v. *Graham* (1889), 24 Q. B. D. 53.
[3] *Davis* v. *Bromley U. D. C.* (1903), 67 J. P. 275; *Johnston* v. *G. W. Ry. Co.*, [1904] 2 K. B. 250.
[4] *Watt* v. *Watt*, [1905] A. C. 115, overruling *Belt* v. *Lawes* (1884), 12 Q. B. D. 356; and *Gatty* v. *Farquharson* (1893), 9 Times L. R. 593.
[5] *Kelly* v. *Sherlock* (1866), L. R. 1 Q. B. 686, 697; *Fulvey* v. *Stanford* (1874), L. R. 10 Q. B. 54.
[6] *Rendall* v. *Hayward* (1839), 5 Bing. N. C. 424; *Forsdike* v. *Stone* (1868), L. R. 3 C. P. 607.
[7] *Mears* v. *Griffin* (1840), 1 M. & Gr. 796; *Kilmore* v. *Abdoolah* (1858), 27 L. J. Ex. 307.
[8] *Phillips* v. *L. & S. W. Ry. Co.* (1879), 5 Q. B. D. 78; *Johnston* v. *G. W. Ry. Co.*, [1904] 2 K. B. 250.

(vii.) If fresh evidence has been discovered subsequently to the trial which is now available to the appellant. But a new trial will only be granted on this ground when such fresh evidence could not with reasonable diligence have been discovered before the trial, and, further, when it is so conclusive as to make it practically certain that the verdict would have been different if it had been adduced.[1]

## The House of Lords.

From the Court of Appeal an appeal lies to the House of Lords. The appellant must file a petition humbly praying that the matter of the judgment appealed against may be reviewed before his Majesty the King in his Court of Parliament, and reversed, varied, or altered; or that such other relief may be given as to that Court may seem meet. This petition must be printed on parchment, and must be signed by two counsel who "humbly conceive this to be a proper case to be heard before your Lordships by way of appeal."[2] Within one week after the presentation of this petition the appellant must give security for the costs of the appeal by recognisance for £500 and a bond for £200, or in lieu of such bond by payment of £200 into the Security Fund Account of the House of Lords. Each party then lodges his case. A case is a printed statement prepared and signed by counsel informing the Lords of the points in controversy and the reasons on which each party relies. The parties generally agree on an appendix which contains copies of all material documents used in evidence in the Court below and often a transcript of the shorthand notes of the oral evidence.

The appeal must be heard before not less than three Lords of Appeal. The House has power to summon the judges of the High Court of Justice to attend and state their opinion on points of law; but this is only done in cases of great importance.[3] If no party appears when the appeal is called on

[1] *Phosphate Sewage Co.* v. *Molleson* (1879), 4 App. Cas. 801; *Young* v. *Kershaw* (1899), 81 L. T. 531; *Turnbull* v. *Deval*, [1902] A. C. 429; but see the judgment of Lord Shaw in *Brown* v. *Dean*, [1910] A. C. at p. 376.

[2] In some cases a previous petition for leave to appeal is necessary.

[3] See *Allen* v. *Flood*, [1898] A. C. 1.

for hearing, it will be dismissed without costs on either side. At the hearing the Court will proceed on the facts proved at the trial, and will not allow new issues of fact to be raised;[1] but the Court will take notice of a question of law raised before it for the first time as to the construction of documents which are in evidence before the House, and of a question of law arising out of facts which have been admitted or proved beyond controversy.[2] The House of Lords has power to hear witnesses, but this power is seldom exercised. On the conclusion of the arguments of counsel the Lord Chancellor, and then the other law lords present, state their reasons for advising the House to give judgment. The Lord Chancellor then puts the question to the House, and declares either that "the contents have it," or that "the non-contents have it," as the case may be. The decision thus arrived at becomes the judgment of the House, and is entered as such in its journals. If the votes of the House are equally divided, the judgment below is affirmed, but without costs.[3] Again, if the appeal succeeds on a point not raised below, no costs are awarded.[4] In all other cases the successful party will, in the absence of special circumstances, be entitled to costs.[5]

[1] See *Huxley* v. *West London Extension Ry. Co.* (1889), 14 App. Cas. at p. 39.
[2] *Connecticut Fire Insurance Co.* v. *Kavanagh*, [1892] A. C. 473, 480.
[3] *Paquin, Ltd.* v. *Beauclerk*, [1906] A. C. 148.
[4] *Cooper* v. *Cooper* (1888), 13 App. Cas. 88.
[5] For further information as to the practice on appeals to the House of Lords, see the Appellate Jurisdiction Acts, 1876 and 1887 (39 & 40 Vict. c. 59; 50 & 51 Vict. c. 70); the Appeal (*Formâ Pauperis*) Act, 1893 (56 & 57 Vict. c. 22); the Annual Practice, 1911, Vol. II. Part VII., pp. 970—998; and Denison and Scott's House of Lords Practice.

## Chapter XXIII.

### PROCEDURE IN THE COUNTY COURT.

The procedure in a County Court is regulated by the County Courts Act, 1888,[1] as amended by the County Courts Act, 1903,[2] and the rules and orders made under it. An ordinary action is commenced by the entry of a plaint in the books of the Court. The registrar thereupon issues a summons under the seal of the Court, which states the names of the parties and the substance of the claim, and also names a day, called "the return day," on which the defendant must appear for the trial of the action. This summons must be served by the high bailiff of the Court at least ten days before the return day.[3] If before the return day the defendant confesses the plaintiff's claim, he will save half the hearing fee and subsequent costs for which he would otherwise be liable.[4]

If the claim for debt or damages exceeds 40*s*., there must be annexed to the summons the plaintiff's particulars of demand. These also are under the seal of the Court, and are treated as part of the summons. They must specify the cause of action and state the amount claimed, with all such detail as the defendant can reasonably require to enable him to defend the action, but with as little technicality as is consistent with brevity and precision. A specimen is subjoined :—

No. of Plaint,

In the County Court of....., holden at.....

*Between* A. B. ..... Plaintiff,

and

C. D. ..... Defendant.

[1] 51 & 52 Vict. c. 43.
[2] 3 Edw. VII. c. 42.
[3] As to proof of service, see 51 & 52 Vict. c. 43, s. 78.
[4] *Ib.*, ss. 98, 99 ; Order IX. of the County Court Rules, 1889, rr. 2—7.

PARTICULARS OF DEMAND.

Particulars of plaintiff's claim for damages suffered by the plaintiff through the negligence and breach of contract of the defendant, and for money received by the defendant to the use of the plaintiff.

In the month of September, 1908, the plaintiff delivered to the defendant a Turkey carpet, which had cost him £28, to be cleaned by the defendant; and the defendant agreed to clean the same with due skill and care. Yet the defendant cleaned the said carpet so negligently and unskilfully that it was utterly spoilt, and is now of no use or value whatever to the plaintiff; wherefore the plaintiff claims damages ..... £20 0 0

The plaintiff also claims the return of the sum of £1 18*s.* which he paid to the defendant under protest, being the amount demanded by him for cleaning the said carpet, work which, through the default of the defendant, has been of no value or benefit whatever to the plaintiff ..... 1 18 0

£21 18 0

Dated the 24th day of November, 1908.

E. F.,
Solicitor for the above-named plaintiff, who will accept service of proceedings on behalf of the plaintiff at his office,
15, Old Square,
Lincoln's Inn, W.C.

To the Registrar of the Court,
and to C. D., the defendant.

There is nothing in the procedure of a County Court corresponding to that under R. S. C. Order XIV. in the High Court. But where the claim is for a debt or liquidated demand, the plaintiff, if not suing as an assignee, may, instead of the ordinary summons, issue a default summons. For this purpose he must file an affidavit verifying the debt; if the amount claimed exceeds £5, or is for the price of goods sold or let on hire to the defendant in the way of his trade, no leave is required; in other cases, leave must be obtained. A default summons must be served on the defendant personally; if the defendant to a default summons does not within eight days give written notice, signed by himself or his solicitor, of his intention to defend, the plaintiff may, after eight days and within two months of service, upon proof of service sign judgment for his debt and costs.

To an ordinary summons, however, the defendant need not, as a rule, enter any appearance, or give any notice either to the Court or to the plaintiff of his intention to defend the action, still less of the nature of his defence. But if the

defendant relies upon any of the following defences, viz., infancy, coverture, tender, Statute of Limitations, discharge in bankruptcy, in an action for libel or slander that the words are true, or any statutory or equitable defence, or if he intends to rely upon a set-off or counterclaim, he must, five clear days before the return day, send a concise statement of the same to the registrar, who will communicate it to the plaintiff.[1] Such notice and statement, omitting the official headings and endings, may be as follows :—

NOTICE OF SET-OFF AND COUNTERCLAIM.

Take notice that the defendant intends at the hearing of this action to claim a set-off and to set up a counterclaim against the plaintiff's demand, the particulars of which are annexed hereto.

SET-OFF AND COUNTERCLAIM.

The defendant claims £23 12*s.* 6*d.*, being the price of goods sold and delivered by the defendant to the plaintiff as under :—

| | | £ | *s.* | *d.* |
|---|---|---|---|---|
| Aug. 2, 1908. | Brass bedstead with spring mattress | 7 | 7 | 0 |
| | 4 Pillows | 1 | 10 | 0 |
| | 2 Turkey rugs | 7 | 0 | 0 |
| | Brass fender | 3 | 3 | 0 |
| | Fire-irons to match | 1 | 15 | 0 |
| | Coal box | 2 | 17 | 6 |
| | | £23 | 12 | 6 |

Either party can in a proper case obtain discovery of documents, and also leave to administer interrogatories to his opponent. The County Court has power, whenever it appears to be just or convenient, to grant an injunction, to make an order in the nature of a *mandamus*, or to appoint a receiver.[2] But there is in the County Court nothing analogous to an originating summons. In common law cases, in which the claim exceeds £5, either party may, by giving at least ten days' notice, obtain a jury, which consists of eight persons, who are summoned from those qualified and liable to serve as jurors at the assizes ;[3] otherwise the judge decides all questions both of fact and law. A special jury cannot be had in the County Court.

[1] *Ib.*, s. 82; County Court Order X., rr. 10—20.
[2] 36 & 37 Vict. c. 66, ss. 89, 90; *R.* v. *Judge Selfe, &c.*, [1908] 2 K. B. 121.
[3] *R.* v. *Farnham County Court Judge* (1910), 103 L. T. 250.

If neither party appears, the case will be struck out; if the defendant appears and does not admit the claim, and the plaintiff does not appear, the case will be struck out, and the defendant may be awarded costs;[1] but if the plaintiff does not appear and the defendant admits the claim to the full amount, he may pay the fees and have judgment entered against him as if the plaintiff had appeared.[2] If the plaintiff appears and the defendant does not appear in any action where plaintiff has proceeded on a default summons, judgment may be entered without further proof. In any other action founded on contract the registrar may, by leave of the judge, upon proof of service of the summons and of the debt, enter judgment for the plaintiff and make an order for payment by instalments; or he may direct judgment of nonsuit or strike out the case, and, subject to the judge's power to grant a new trial, such judgment shall be final.[3] In an action of tort, however, such powers can be exercised only by the judge.[4]

Where both parties appear, the registrar, at the request of the parties and by leave of the judge, may hear and determine any disputed claim up to £2.[5]

The procedure at the hearing is similar to the trial of an ordinary High Court action, except that the advocate for the defendant is only entitled to make one speech whether he has called witnesses or not.[6]

At the end of the case judgment is given for the plaintiff or defendant and entered on the minutes of the Court. The judge also directs the mode of payment of any sum to which he may find the plaintiff entitled. In certain cases he will direct payment by instalments, and then execution will not issue till after default be made in payment of an instalment; on such default execution can issue for the whole sum due.[7] The costs of the action abide the event, unless the judge in

[1] 51 & 52 Vict. c. 43, ss. 88, 89.
[2] *Ib.*, s. 88.
[3] *Ib.*, s. 90.
[4] *Ib.*, s. 91.
[5] *Ib.*, s. 92.
[6] *Clack* v. *Clack*, [1906] 1 K. B. 483.
[7] *Ib.*, ss. 105, 149.

his discretion otherwise orders, and execution may issue for the recovery of any such costs in the same manner as for the debt or damages recovered in the action.

The judge of a County Court, moreover, has in a case within his jurisdiction power to grant an injunction against a nuisance, and to commit to prison for disobedience thereto.[1]

When the judgment has been entered up, it may be enforced by execution against the goods, leviable by writ of *fieri facias;* and it may be worth notice that the wearing apparel and bedding of the judgment debtor or his family, and the tools and implements of his trade, to the value of £5, are protected from seizure.[2]

Payment of money under a judgment or order of the County Court may sometimes be enforced by committing the defaulting debtor to prison for a period not exceeding six weeks.[3] The order of commitment must be made by the judge in open court on the hearing of a judgment summons; it must state on its face the ground on which it is issued.

Where a debtor has once been so committed, though for a period short of six weeks, a second warrant of commitment cannot be issued against him in respect of the same debt. Where, however, the debt has been made payable by instalments, the debtor may be committed for the full period of six weeks for default in payment of each instalment.[4]

A County Court judge has also in some cases power to commit for contempt of Court.[5] Moreover, if he thinks that any person who has given evidence before him has committed perjury, he may direct him to be prosecuted and commit him for trial at the next assizes of the county within which the perjury was committed.[6]

The judge of a County Court has power, whether within the district of any of his Courts or not, to make any order or exercise, on *ex parte* application, any jurisdiction in an action pending in any Court of which he is judge, which in the High Court could be made or exercised by a judge at chambers.

[1] *Ex parte Martin* (1879), 4 Q. B. D. 212; *Martin* v. *Bannister* (1879), *Ib.* 491.
[2] 51 & 52 Vict. c. 43, s. 147. As to interpleader where the goods taken in execution are claimed by a third person, see s. 157, and *ante*, p. 1319.
[3] Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5.
[4] *Evans* v. *Wills* (1876), 1 C. P. D. 229.
[5] 51 & 52 Vict. c. 43, s. 162; and see *R.* v. *Lefroy* (1873), L. R. 8 Q. B. 134; *R.* v. *Judge of Surrey County Court* (1884), 13 Q. B. D. 963; and *ante*, p. 196.
[6] 14 & 15 Vict. c. 100, s. 19.

With the consent of both parties, he may hear and decide a cause or matter at any place.[1]

The judgment of a County Court judge is final and binding between the parties, so long as it remains unreversed. Neither party will be allowed to fight the same question over again in a subsequent action in any Court.[2] Nevertheless, any party who is dissatisfied with the decision may apply to the County Court judge to grant a new trial. Where the action was heard in the absence of the defendant, the judge may grant a new trial on such terms as he thinks fit. But if both parties were present at the hearing, an application for a new trial can only be made on grounds which would be sufficient in the High Court.[3] A new trial will only be ordered if the judge thinks it just to do so, and upon such terms as he shall think reasonable. The application is most frequently made on the ground of surprise, or that fresh evidence is now forthcoming which could not with reasonable diligence have been discovered before the trial.[4] It may be made and determined on the day of trial if both parties are present, or at the first Court held next after the expiration of twelve clear days from the day of trial. In the latter case the party intending to apply must, seven days before the holding of the Court, deliver to the registrar and serve on his opponent a notice in writing of his intention to apply for a new trial, and state in it his grounds for so doing. The judge may in his discretion order that the new trial, if he thinks fit to grant one, shall take place before a jury, although the action was not originally so tried.[5]

But if either party be dissatisfied with the determination or direction of a County Court judge on any point of law or equity, or as to the admission or rejection of any evidence, he has another remedy.[6] He can on any of these grounds appeal to a Divisional Court of the High Court of Justice,

[1] 51 & 52 Vict. c. 43, s. 9.
[2] *Stephenson* v. *Garnett*, [1898] 1 Q. B. 677 ; but see 51 & 52 Vict. c. 43, s. 61.
[3] *Brown* v. *Dean*, [1910] A. C. 373 ; *Murtagh* v. *Barry* (1890), 24 Q. B. D. 632.
[4] *Phosphate Sewage Co.* v. *Molleson* (1879), 4 App. Cas. 801, 814.
[5] 51 & 52 Vict. c. 43, s. 93 ; and see *Murtagh* v. *Barry*, *supra*.
[6] *Ib.*, s. 120.

whose decision is final, unless leave to appeal be given by that Court or by the Court of Appeal.[1] He can on any of these grounds appeal even against an interlocutory order, such, for instance, as the refusal to grant a new trial. "There is no power to review the decision of fact arrived at in the County Court by any other tribunal than the County Court itself. A matter of law can be made the subject of appeal, but then only when the point has been raised at the trial before the learned judge."[2] If either party is dissatisfied at the trial with the decision of the judge on any point of law that is raised, the proper course is for him to request the judge to take a note of the point of law, of the facts in evidence relating thereto and of his decision thereon. A copy of such note must be furnished to the party requiring the same for the purpose of appeal.[3] This note may be made by the judge even after the hearing of the suit,[4] but in the absence of such note the Court may act on any other evidence or statement which it deems sufficient.[5] But the fact that no such request was made to the judge is not an absolute bar to an appeal. If the appellant can satisfactorily explain why such request was not made, the Court will decide the appeal upon any other evidence or statement of what occurred before the judge, as the Court may deem sufficient.[6]

In some cases, however, an appeal will not lie without the leave of the County Court judge. Where the debt or damages claimed in an action of contract or tort does not exceed £20, neither party can appeal without the leave of the County Court judge, unless an injunction was also claimed and has been granted.[7] Again, no appeal lies without leave

[1] Judicature Act, 1894 (57 & 58 Vict. c. 16), s. 1.

[2] *Per* Lord Halsbury, L. C., in *Smith* v. *Baker & Sons*, [1891] A. C. at p. 333; *R.* v. *Sir Rupert Kettle* (1886), 17 Q. B. D. 761; *Wilkinson* v. *Jagger* (1887), 20 Q. B. D. 423; *Cusack* v. *L. & N. W. Ry. Co.*, [1891] 1 Q. B. 347; R. S. C., Order LIX., rr. 10—17; Order XXXII. of the County Court Rules, 1889.

[3] 51 & 52 Vict. c. 43, ss. 120, 121.

[4] See *Turner* v. *G. W. Ry. Co.* (1877), 2 Q. B. D. at pp. 125, 126.

[5] R. S. C., Order LIX., r. 8. This rule applies only if a copy has been applied for and refused: *Cook* v. *Gordon* (1892), 61 L. J. Q. B. 445.

[6] R. S. C., Order LIX., r. 8; *Wohlgemuthe* v. *Coste*, [1899] 1 Q. B. 501.

[7] *Brune* v. *James*, [1898] 1 Q. B. 417.

in any interpleader proceeding, where the money claimed or the value of the goods or chattels claimed or their proceeds does not exceed £20, or in any action for the recovery of tenements, where the yearly rent or value of the premises does not exceed £20. But in all other actions of ejectment, in all equity actions or matters, in all actions in which the title to any corporeal or incorporeal hereditament is in issue, and probably in all cases where jurisdiction to try the action in the County Court has been given by consent, either party can appeal without leave, whatever the amount in dispute may be.[1] But if before the decision of the Court was pronounced both parties agreed in writing, signed by themselves or their solicitors or agents, that the decision of the judge should be final, all right of appeal is lost.[2]

The appellant must give notice of appeal to his opponent within twenty-one days from the date of the judgment, order or finding complained of; and he must within the same period enter the appeal in the Crown Office of the High Court of Justice. But the time for appealing can be extended by the High Court, if good grounds be shown. The notice of motion must state the grounds of the appeal, and whether all or part only of the judgment, order or finding is complained of.[3]

### WORKMEN'S COMPENSATION CASES.

A "workman" who claims to have been injured by any accident arising out of and in the course of his employment must serve on his employer notice in writing of the accident,[4] as soon as practicable after it occurred and before he has voluntarily left the employment in which he was injured. If the accident be fatal, notice of it must be given by the legal personal representative of the workman or by those who

[1] 51 & 52 Vict. c. 43, s. 120. The plaintiff cannot at the trial abandon the excess of his claim over £20, so as to deprive the defendant of his right of appeal: *North* v. *Holroyd* (1867), L. R. 3 Ex. 69.
[2] *Ib.*, s. 123.
[3] R. S. C., Order LIX., r. 10.
[4] *Hughes* v. *Coed Talon Colliery Co.*, [1909] 1 K. B. 957.

were dependent on him.[1] Such notice must give the name and address of the person injured and the date of the accident, and must state in ordinary language the cause of the injury. The absence of a notice or any defect or inaccuracy in one which is given will not be a bar to a claim unless the employer is prejudiced by such absence, defect or inaccuracy.

A claim for compensation must also be made on the employer within six months from the occurrence of the accident, or, in the case of death, within six months from the death; else the claim will not be maintainable, unless the delay be occasioned by mistake, absence from the United Kingdom, or other reasonable cause. This claim may be verbal, if it is sufficiently explicit; but it is often included in the written notice of the accident. It need not be a claim for a specific sum.[2]

If the employer disputes his liability or the amount or duration of the compensation payable by him, the question will be settled by arbitration, not by an action at law. The first step which the injured workman must take is to file an application for arbitration with the registrar of the County Court of the district in which either he or his employer resides. This document must be in the following form:—

APPLICATION FOR ARBITRATION BY INJURED WORKMAN WITH RESPECT TO THE COMPENSATION PAYABLE TO HIM.

In the County Court of Middlesex, holden at Bloomsbury.

In the Matter of the Workmen's Compensation Act, 1906.

No. of Matter, 24 of 1908.

In the Matter of an Arbitration between

THOMAS JONES, of 185, Cleveland Street, Fitzroy Square, London, W., Coachman - - - - - - - - - *Applicant*,

and

WILLIAM SMYTH, of 118, Portland Place, London, W., Gentleman - *Respondent*.

1. On the 26th day of September, 1908, personal injury by accident arising out of and in the course of his employment was caused to Thomas Jones, a workman employed by William Smyth.

[1] The person who most usually claims as a dependant is of course the widow of the deceased workman; she need not take out letters of administration for this purpose: *Clatworthy* v. *Green* (1902), 86 L. T. 702. Whether she was or was not dependent upon her husband during his lifetime is a question of fact and not of law. If she loses her husband and two sons by the same accident, she can claim compensation as dependent upon all three of them, if they did in fact all three contribute to the maintenance of the family: *Hodgson* v. *Owners of West Stanley Colliery*, [1910] A. C. 229, though the contrary principle was no doubt applied in *Coulthard* v. *Consett Iron Co.*, [1905] 2 K. B. 869.

[2] *Thompson* v. *Goold*, [1910] A. C. 409.

2. Questions have arisen as to the liability of the said William Smyth to pay compensation, and as to the amount and duration of the compensation payable by the said William Smyth to the said Thomas Jones under the above-mentioned Act in respect of the said injury.

3. An arbitration under the above-mentioned Act is hereby requested between the said Thomas Jones and the said William Smyth for the settlement of the said questions.

4. Particulars are hereto appended :—

PARTICULARS.

| | |
|---|---|
| 1. Name and address of applicant .. | 1. Thomas Jones, 185, Cleveland Street, Fitzroy Square, London, W. |
| 2. Name, place of business, and nature of business of respondent. | 2. William Smyth, 118, Portland Place, London, W., gentleman. |
| 3. Nature of employment of applicant at time of accident, and whether employed under respondent or under a contractor with him. | 3. Coachman in the employ of the respondent. |
| 4. Date and place of accident, nature of work on which workman was then engaged, and nature of accident and cause of injury. | 4. On the 26th September, 1908, the applicant whilst cleaning the respondent's carriage at the respondent's stable in Cleveland Mews, Fitzroy Square, W., caught his foot in the wheel and was thrown to the ground, and violently twisted his knee. |
| 5. Nature of injury. | 5. Severe injury to the knee, producing synovitis. |
| 6. Particulars of incapacity for work, whether total or partial, and estimated duration of incapacity. | 6. Total incapacity ; duration indefinite. |
| 7. Average weekly earnings during the twelve months previous to the injury, if the applicant has been so long employed under the employer by whom he was immediately employed, or if not, during any less period during which he has been so employed. | 7. 18*s.* per week, and board and lodging. |
| 8. Average weekly amount which the applicant is earning or is able to earn in some suitable employment or business after the accident. | 8. None. |
| 9. Payment, allowance or benefit received from employer during the period of incapacity. | 9. Nothing. |
| 10. Amount claimed as compensation. | 10. 15*s.* per week during incapacity. |
| 11. Date of service of statutory notice of accident on respondent, and whether given before workman voluntarily left the employment in which he was injured. (*A copy of the notice, if any, to be annexed.*) | 11. 24th October, 1908 (*copy annexed*). |
| 12. If notice not served, reason for omission to serve same. | 12. |

The names and addresses of the applicant and his solicitors are :—

Of the applicant,

THOMAS JONES,

185, Cleveland Street, Fitzroy Square, London, W. ;

Of his solicitors,

HUGHES & WILLIAMS,

98, Great Portland Street, London, W.

The name and address of the respondent to be served with this application are :—
William Smyth, Esq., 118, Portland Place, London, W.

Dated this 14th day of December, 1908.

(Signed) HUGHES & WILLIAMS,
98, Great Portland Street, London, W.,
*Applicant's solicitors.*

The judge then fixes a day for the arbitration, and the registrar gives notice of the date to both parties. The registrar also forwards a copy of the above application and particulars to the respondent. The respondent, unless he admits the claim, must file an answer to it within ten clear days before the day fixed for the arbitration. Such answer may be in the following form :—

[*Heading as in application for arbitration.*]

ANSWER.

TAKE NOTICE that the respondent, William Smyth, states that the applicant's particulars filed in this matter are inaccurate or incomplete in the particulars hereto annexed.

[*E.g.* The said particulars are inaccurate in stating :

(a) That the applicant met with any accident whilst in the employment of the respondent ;

(b) That the alleged accident happened at the time and in the manner stated by the applicant, and that the alleged injuries were caused by such accident ;

(c) That the stable at which the alleged accident happened is the respondent's stable ;

(d) That the injuries, if any, sustained by the applicant caused synovitis, or any permanent disablement or total incapacity.]

That the respondent desires to bring to the notice of the judge [*or* arbitrator] the facts stated in the particulars hereto annexed.

[*E.g.* That the applicant refuses to submit himself to medical examination as required by the respondent in accordance with paragraph 4 of the First Schedule to the Act.[1]]

That the respondent intends at the hearing of the arbitration to give evidence, and rely on the facts stated in the particulars hereto annexed.

[*E.g.* That notice of the alleged accident was not given to the respondent as required by the Act ;

That the claim for compensation was not made on the respondent within the time limited by the Act.]

That the respondent denies his liability to pay compensation under the Act in respect of the injury to the applicant mentioned in the applicant's particulars, on the grounds stated in the particulars hereto annexed.

[*E.g.* That the injury to the applicant was not caused by any accident arising out of and in the course of his employment ;

That such injury was attributable to the serious and wilful misconduct of the applicant, and did not result in death or serious and permanent disablement ;

[1] Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58).

That at the time of the alleged accident the applicant was not in the employ of the respondent, but was then employed by Simon Clarke, jobmaster, of Cleveland Mews, Fitzroy Square, W.

*Or*, if the claim be made under section 8—

That the disease mentioned in the applicant's particulars was not contracted whilst the applicant was in the employment of the respondent;

That the disease mentioned in the applicant's particulars was not due to the nature of the employment in which the applicant was employed by the respondent.]

And further take notice that the names and addresses of the said respondent and his solicitors are :—

Of the respondent,
WILLIAM SMYTH,
118, Portland Place, London, W.;

Of his solicitors,
BLACK & WHITE,
80, Bedford Row, London, W.C.

Dated this 11th day of January, 1909.

(Signed) BLACK & WHITE,
Solicitors for the respondent.

To the registrar of the Court, and
To the applicant. Thomas Jones.

Unless the parties agree upon a private arbitrator, the case will be heard either by the County Court judge himself, or by an arbitrator appointed by him with the consent of the Lord Chancellor. The Arbitration Act, 1889,[1] does not apply to such an arbitration.[2] The amount of compensation is regulated by the rules set out in Schedule I. of the Act. Except in the case of death, the award directs a weekly payment to be made by the respondent; it does not award a lump sum payable immediately to the applicant. The award can be enforced in the same way as a County Court judgment. The employer may subsequently apply to determine or diminish the weekly payment on the ground that the applicant has wholly or in part recovered from his injuries and is earning some wages. And generally, whenever the circumstances have altered, the County Court judge has power to vary the award.

It is the duty of the arbitrator to ascertain whether on the day of the hearing the applicant is disabled from doing his ordinary work by reason of injuries caused by an accident which arose out of and in course of his

[1] 52 & 53 Vict. c. 49.
[2] 6 Edw. VII. c. 58, Schedule II. (4).

employment. If so, he must make an award in his favour; and in such award he cannot fix a date at which the weekly payment should cease. "It is not competent for an arbitrator to make a prospective award on the lines of the one now under appeal. In the first place, the arbitrator's jurisdiction exists only during the incapacity of the workman, and he has no right to take upon himself the functions of a prophet and say the man was going to be quite well at some future date; and in the second place, an award of this kind shifts the *onus* of proof from the employer to the workman, and might be very unfair on the latter. The arbitrator's duty is confined to ascertaining what was the workman's earning capacity at the date of the application to review and to award accordingly; if the man recovers, the *onus* is then on the employer to prove the change of circumstances when he makes a further application to review; an award in the present form throws this *onus* upon the workman instead of the employer."[1]

The award, therefore, is now usually in the following form :—

In the Matter of an Arbitration between A. B. and C. D.

Having duly considered the matter submitted to me, I do hereby make my award as follows :—

1. I order that the respondent, C. D., do pay to the applicant, A. B., the weekly sum of fifteen shillings as compensation for personal injury caused to the said A. B. on the 1st day of January, 1908, by accident arising out of and in the course of his employment as a workman employed by the said respondent, such weekly payment to commence as from the 23rd day of February, 1910, and to continue during the total or partial incapacity of the said A. B. for work, or until the same shall be ended, diminished, increased or redeemed in accordance with the provisions of the above-mentioned Act.

2. And I order that the said C. D. do forthwith pay to the said A. B. the sum of £15 15*s.*, being the amount of such weekly payments calculated from the 23rd day of February, 1910, until the 20th day of July, 1910, and do thereafter pay the said sum of fifteen shillings to the said A. B. on Wednesday in every week.

3. And I order that the said C. D. do pay to the registrar of this Court, for the use of the applicant, his costs of and incident to this arbitration, such costs, in default of agreement between the parties as to the amount thereof, to be taxed by the registrar under column B. of the scales of costs in use in the County Courts, and to be paid by the said C. D. to the registrar within fourteen days from the date of the certificate of the result of such taxation.

4. And I direct that either party have liberty from time to time to apply as he or they may think fit.

Dated this 25th day of July, 1910.

X. Y. Z.,
*Arbitrator.*

The decision of an arbitrator appointed by the County Court judge with the consent of the Lord Chancellor to settle any claim under the Workmen's Compensation Act, 1906,[2]

[1] *Per* Cozens-Hardy, M. R., in *Baker* v. *Jewell*, [1910] W. N., at p. 180.
[2] 6 Edw. VII. c. 58.

cannot be reviewed in any way, unless such arbitrator thinks fit to submit a question of law to the County Court judge. If, however, the County Court judge himself acts as arbitrator, or if he gives any decision on a question of law submitted to him by an arbitrator, there is no appeal on any question of fact; but the decision of the County Court judge can be reviewed on either of the following grounds :—

(a) that there is no evidence to support his finding ;

(b) that he proceeded upon an erroneous view of the law, *i.e.*, having ascertained the facts, he applied the law wrongly.

The appeal on these grounds lies to the Court of Appeal and not to a Divisional Court; and from the decision of the Court of Appeal an appeal lies to the House of Lords.

# BOOK VI.

## THE LAW OF PERSONS.

So far we have discussed the rights of individuals who are under no disability, and who can sue or be sued in their own right. We propose in this Book to examine the rights and liabilities arising from personal disability or special personal relations with others, both in civil and criminal cases. The relation of master and servant arises, as a rule, out of a contract: so does the relation of principal and agent. Hence these two relations have been already discussed in the Book on Contracts.[1] As a general rule, a master is not criminally liable for the criminal act of his servant, nor a principal for a crime committed by his agent—unless he expressly or impliedly ordered that act to be done; but to this rule, as we have seen, there are exceptions.[2] The liability of a master or principal for any tort committed by his servant or agent has been dealt with in Book III., chiefly under the heads of Negligence and Joint Torts.[3] We proceed here to treat of such classes of persons as:—

I. Husband and wife.
II. Infants.
III. Lunatics.
IV. Executors and administrators.
V. Bankrupts.
VI. Corporations.
VII. The King and his officers.
VIII. The legal profession.

[1] *Ante*, pp. 834—866.
[2] *Ante*, pp. 126, 127, 174, 232, 233.
[3] *Ante*, pp. 484—487, 616.

## Chapter I.

### HUSBAND AND WIFE.

The common law of England placed a married woman under grave disabilities. Although she could commit both crimes and torts, she could not make a contract; she could not make a will or appoint an agent. She could hold lands as tenant in fee simple, in tail, or for life; but her husband was entitled to the income, unless the land was settled on trustees for her. The husband also on the marriage became absolutely entitled to all her chattels personal in possession, and also to such of her choses in action as he reduced into possession during coverture. He had, moreover, the right to dispose of her chattels real; but if he died before reducing her choses in action into possession or alienating her chattels real, they survived to her; he had no right to dispose of these by will.

In most other matters the rule was that "a husband and wife are one"—a rule which, while it often protected the wife, generally benefited the husband at her expense; though in a few cases, as we shall see, it imposed upon him serious liabilities.

By the custom of the City of London, however, a married woman from early times could carry on a trade. The Court of Chancery, at a later date, permitted her to enjoy her separate property independently of her husband, though it recognised as valid a proviso forbidding her to anticipate her income, which would not be valid in the case of a man, a spinster or a widow. And now by the successive Married Women's Property Acts, 1870 to 1908,[1] she has been placed practically in the position of a *feme sole*, so far as her property

[1] 33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50; 45 & 46 Vict. c. 75; 56 & 57 Vict. c. 63; 8 Edw. VII. c. 27.

is concerned. In other respects, however, certain disabilities still remain.[1]

The validity of a marriage depends upon the law of the domicil of the parties, so far as their personal capacity to marry is concerned, and upon the law of the place of celebration, so far as the form of the ceremony is concerned. If either party at the time of the marriage is an idiot, or if the parties are within the prohibited degrees of relationship, or even if the parties are Protestants and yet go through a form of marriage appropriate for Roman Catholics alone, the marriage is invalid.

The validity of an English marriage now mainly depends upon statute.[2] Marriage within the forbidden degrees of affinity and consanguinity is prohibited not only by ecclesiastical law, but also by express statute.[3] Marriage with a deceased wife's sister is now valid.[4] But besides those invalid marriages which are actually void (*i.e.*, which will be treated as null by any Court where evidence is given of the circumstances that invalidate them), there are others which are only voidable. A marriage is voidable when the cause of its invalidity is merely one for which a Court of matrimonial jurisdiction may set it aside, if called upon to do so whilst both the parties are still alive, as, for instance, where either party to the marriage is sexually impotent.[5] But, until thus set aside, such a marriage must be treated by all Courts as valid.

A husband is entitled to his wife's society. She must live where he wishes and in the house he provides for her, unless the Court has judicially separated them[6] or they have agreed to live apart. But the husband is not entitled to exercise force to claim his rights.[7] If either party declines cohabitation, the remedy is to obtain a decree of restitution of conjugal rights, but if the decree is not obeyed it is now only enforced by judicial separation. A husband, however, is not bound to maintain his wife, if without cause she refuses to live with him.[8]

[1] For instance, she cannot sue or be sued by her husband in the same way as either can sue or be sued by a stranger (see *post*, p. 1349). A judgment against a man, a spinster or a widow is a judgment against them personally, but a judgment against a married woman is against her separate property, not against her (see *post*, p. 1356). A married woman cannot be a guardian *ad litem*: *In re Duke of Somerset* (1887), 34 Ch. D. 465; *London and County Bank* v. *Bray*, [1893] W. N. 130. As to when a married woman can be made a bankrupt, see *post*, p. 1389.

[2] 4 Geo. IV. c. 76, s. 21; 6 & 7 Will. IV. c. 85, s. 39.

[3] 5 & 6 Will. IV. c. 54.

[4] 7 Edw. VII. c. 47. See *R.* v. *Dibdin*, [1910] P. 57.

[5] *B. alias A.* v. *B.* (1891), 27 L. R. Ir. 587, 608.

[6] Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 16; Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5.

[7] *R.* v. *Jackson*, [1891] 1 Q. B. 671.

[8] See *post*, p. 1354.

As against third persons the husband's right to the society of his wife can be enforced by action. It is true that since the Matrimonial Causes Act, 1857,[1] he can only claim damages for adultery in proceedings in the Divorce Court, the old common law action of criminal conversation being abolished. But for other wrongs done to her, such as assault or false imprisonment, if they actually cause him for a time to lose her society, he can sue.[2] She also has a right of action for the same wrongs and can sue in her own right in respect of them.

The fiction that a husband and wife are but one person still lingers in our criminal law. Thus a husband and wife cannot be guilty of a conspiracy, unless some third person conspires with them. A wife does not—at all events apart from the provisions of the Married Women's Property Acts—commit a crime if she receives from her husband goods which she knows to have been stolen. Except in very special circumstances,[3] a wife cannot steal from her husband or a husband from his wife.

And there are many cases in which a wife still derives immunity from the fact that she is supposed to be in subjection to her husband. Thus, if a married woman commits a crime in the presence of her husband, or even in his company, the law presumes that she was incapable of freely exercising her will and judgment and acted only under his coercion, and so will excuse her from punishment, although there be no evidence of actual intimidation on his part. Such immunity is not granted to a wife who commits one of the graver felonies, such as treason, murder or manslaughter, in the presence of or under the actual coercion of her husband.[4] It is only admissible in the less serious felonies, such as burglary,[5] robbery,[6] forgery,[7] felonious assault,[8] or sending threatening

[1] 20 & 21 Vict. c. 85, s. 59.
[2] See the judgment of Parke, B., in *Norris* v. *Seed* (1849), 3 Exch. at p. 791; cf. *Watson* v. *Jackson*, [1909] 2 K. B. 193.
[3] See *R.* v. *Streeter* (1900), 2 Q. B. 601, and *ante*, pp. 337, 373.
[4] *R.* v. *Manning* (1849), 2 C. & K. 903, n.
[5] *R.* v. *Wharton* (1664), Kelyng, 37; *R.* v. *Knight* (1823), 1 C. & P. 116.
[6] *R.* v. *Torpey* (1871), 12 Cox, 45.
[7] *R.* v. *Hughes* (1813), 2 Lewin, 229.
[8] *R.* v. *Smith* (1858), Dearsl. & B. 553.

letters,[1] and in most misdemeanours; and even in these cases special circumstances—as if "the husband was a cripple and bedridden"—may be given in evidence to repel the presumption of coercion.[2] Again, if it be proved that the wife took the leading part in the commission of the crime, voluntarily and not by the constraint of her husband, then the mere fact that he was present will not excuse her from punishment.[3] And so a married woman may be convicted for keeping a brothel[4] or a gaming-house,[5] either with or without her husband being joined, for in the management of a house the wife takes a leading part. But where the wife commits a crime in the absence of her husband, no presumption of coercion arises, even though she did the act by his express command. She will be convicted as a principal[6] and he as an accessory before the fact. And coverture will, of course, be no defence where the husband had nothing to do with the crime committed by his wife.[7]

For the purpose of raising the defence that the prisoner acted under her husband's coercion, the marriage need not be strictly proved; evidence of reputation is admissible, and may be sufficient to satisfy the jury. If the woman is charged in a joint indictment as the wife of the man, no kind of proof is necessary. Mere cohabitation will not, however, suffice to discharge the woman from liability. A wife, who has incited her husband to the commission of a felony, can be indicted and convicted as an accessory before the fact, if the felony be committed; if not, she can be convicted of the misdemeanour of inciting. But although she knows that he has committed a felony, she has a right to receive and screen him.[8]

If a tort be committed against a married woman, she has now two courses open to her. She may either sue alone, or she may join her husband as co-plaintiff; in the latter case the husband will be entitled to recover in the same action[9]

[1] *R.* v. *Hammond* (1787) 1 Leach, 444, 447.
[2] *Per* Vaughan, J., in *R.* v. *Cruse* (1838), 8 C. & P. 553, 554.
[3] *R.* v. *Cohen* (1868), 11 Cox, 99; *R.* v. *Torpey* (1871), 12 Cox, 45.
[4] *R.* v. *Williams* (1711), 10 Mod. 63; and see *R.* v. *Cruse* (1838), 8 C. & P. 541.
[5] *R.* v. *Dixon* (1716), 10 Mod. 335.
[6] *R.* v. *Morris* (1814), Russ. & Ry. 270.
[7] *R.* v. *Hughes* (1813), 2 Lewin, 229; *R.* v. *Carlile* (1819), 3 B. & Ald. 167.
[8] For the rules regulating the evidence of a husband or wife against his or her spouse, see *ante*, pp. 1083, 1084.
[9] Order XVIII., r. 4.

any special damage that may have occurred to him. But where special damage is essential to the cause of action, she cannot sue alone unless she can show special damage to herself. That her husband has sustained special damage in consequence of the tort committed against her will not avail her. In cases of libel or slander, however, the husband will be allowed to sue for and recover any such special damage, although his character was not defamed; for the reputation of a husband is so intimately connected with that of his wife, that he has always been allowed to sue whenever he has suffered damage, as though the words had been spoken of himself.[1]

By the Married Women's Property Act, 1882,[2] s. 1 (2), a married woman is now capable "of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

A married woman, therefore, may now sue for a tort without her husband or any next friend; and she cannot be ordered to give security for the costs of the action, even although she have at the time of action no separate estate, and there be nothing upon which, if she fails, the defendant can issue available execution.[3]

The damages recovered in any action brought by the wife alone under this Act are to be her separate property; she, therefore, still cannot recover for any loss which her husband has suffered. "The Act does not destroy the husband's right, but only relieves the woman from incapacity."[4]

If a tort be committed against the wife before the marriage, the husband may still be joined as a co-plaintiff with her; if she marry pending action,

[1] *Riding* v. *Smith* (1876), 1 Ex. D. 91; and see Odgers on Libel and Slander, 4th ed., p. 530.

[2] 45 & 46 Vict. c. 75.

[3] *In re Isaac, Jacob* v. *Isaac* (1885), 30 Ch. D. 418; *Threlfall* v. *Wilson* (1883), 8 P. D. 18; *Severance* v. *Civil Service Supply Association* (1883), 48 L. T. 485.

[4] *Per* Bowen, L. J., in *Weldon* v. *Winslow* (1884), 13 Q. B. D. at p. 788.

the husband may be made a party,[1] though this is not necessary.[2] The right of action survives to the wife on her husband's death, whether he was a party or not; the action does not abate. If, however, the wife dies before final judgment, the action ceases; it cannot be continued by her husband either *jure mariti*, or as her administrator. If a married woman fail in an action she may be condemned in costs, although her husband was joined as a co-plaintiff.[3]

By section 12 of the same Act, "every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

This section does not enable a married woman to take proceedings against her husband for a tort upon herself.[4] Nor can either spouse sue the other for a purely personal tort, such as malicious prosecution[5] or slander.[6] And this rule applies, even after divorce or judicial separation, to such causes of action as arose during the time that they were living together.[7]

But a wife, living apart from her husband under a separation order obtained by virtue of the Summary Jurisdiction (Married Women) Act, 1895,[8] can maintain an action of libel against him.[9]

We pass now to those cases in which a tort has been committed by, not against, a married woman. Her separate estate is liable in damages for such a tort.[10] But her husband is also liable for all torts committed by her during coverture. "They are the torts of her husband, and therefore she creates as against her husband a liability."[11] And there is nothing

[1] Order XVII., r. 4.
[2] *Ib.*, r. 1.
[3] *Newton* v. *Boodle* (1849), 4 C. B. 359; and see 56 & 57 Vict. c. 63, s. 2.
[4] *R.* v. *Lord Mayor of London* (1886), 16 Q. B. D. 772.
[5] *Tinkley* v. *Tinkley* (1908), 25 Times L. R. 264.
[6] *Young* v. *Young* (1903), 5 F. 330 (Ct. of Sess.).
[7] *Phillips* v. *Barnet* (1876), 1 Q. B. D. 436.
[8] 58 & 59 Vict. c. 39.
[9] *Robinson* v. *Robinson* (1897), 13 Times L. R. 564.
[10] Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1.
[11] *Per* Jessel, M. R., in *Wainford* v. *Heyl* (1875), L. R. 20 Eq. at p. 325.

in any of the Married Women's Property Acts removing or affecting this liability.[1]

Hence, although a plaintiff may now, if he wishes, sue the wife alone, he generally sues the husband as well. For if he sue the wife alone, he can only obtain execution against her separate estate in the form settled by the Court of Appeal in *Scott* v. *Morley*.[2] Moreover, the judgment against the wife, if sued alone, will release the husband from all liability for the same tort; the plaintiff cannot proceed against him in case the separate property prove insufficient; whereas if he join both husband and wife as defendants on his writ, he can obtain judgment against the wife's separate estate, and also against the husband for the residue of damages and costs not recovered out of her separate estate.

When husband and wife are both made defendants, they must both be served, unless the Court or a judge shall otherwise order.[3] But "there can only be one defence and one judgment."[4] Hence if either husband or wife pay money into court, the other cannot plead any defence denying liability.[5] In the case of a wife's ante-nuptial tort there is an express provision that, as between her and her husband, her separate estate shall be deemed to be primarily liable for damages and costs recovered. There is, however, no such provision in the case of a post-nuptial tort, and a husband who has had to pay damages for such a tort will have no remedy over against her separate estate. But the plaintiff may, of course, enforce his joint judgment against the separate property of the wife, and not against the husband.[6]

At common law a husband was liable to the full extent for damages resulting from torts committed by his wife before they were married. But the law in this respect has been modified by the Married Women's Property Act, 1882. A husband is now liable for such wrongs, only "to the extent of all property whatsoever belonging to her which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid."[7]

[1] *Hancocks* v. *Demeric-Lablache* (1878), 3 C. P. D. 197; *Seroka* v. *Kattenburg* (1886), 17 Q. B. D. 177; *Earle* v. *Kingscote*, [1900] 2 Ch. 585; but see the observations of Moulton, L. J., in *Cuenod* v. *Leslie*, [1909] 1 K. B. at p. 888—890, which call in question, but cannot overrule, the doctrine laid down above.

[2] (1887), 20 Q. B. D. at p. 132.

[3] Order IX., r. 3.

[4] *Per* Romer, L. J., in *Beaumont* v. *Kaye and wife*, [1904] 1 K. B. at p. 294.

[5] *Ib.*, and Order XXII., r. 1.

[6] *Morris* v. *Freeman* (1878), 3 P. D. 65. It is not necessary for this purpose that the trustees of her marriage settlement should be made parties to the action: *Davies* v. *Jenkins* (1877), 6 Ch. D. 728. An inquiry will be directed to ascertain of what her separate estate consists, and in whom it is vested, as in *Collett* v. *Dickenson* (1879), 11 Ch. D. 687; and on such inquiry the solicitor to the trustees will be bound to state their names, and to produce the deed of settlement; *Bursill* v. *Tanner* (1885), 16 Q. B. D. 1.

[7] S. 14, and see s. 15.

Moreover, all sums recovered against a married woman in respect of wrongs committed by her before her marriage or for any costs relating thereto are now "payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such wrongs, and for all damages or costs recovered in respect thereof."[1]

If a husband and his wife join in suing for any injury done to the wife, and one of them dies, the action will not abate so far as the causes of the action belonging to the survivor are concerned.[2] If they are both defendants in an action brought for a tort committed by the wife, and the husband dies before judgment, the action continues against the widow; if, however, the wife dies in the lifetime of her husband before judgment, the action immediately abates, whether it was for a post-nuptial or an ante-nuptial tort,[3] unless he himself joined in or authorised it. If they be divorced or judicially separated, the wife must be sued alone; the husband is released from all liability, even though the tort was committed before the divorce or judicial separation.[4] But if the husband and wife voluntarily live apart under a separation deed, the common law rule prevails, and the husband may be joined as a defendant.[5]

At common law a married woman could not contract with her husband, nor with anyone else except as agent for her husband. But this absurdity has been remedied by the various Married Women's Property Acts;[6] and now any woman married since 1882 can possess separate property over which her husband has no control, and may contract so as to bind such separate property. She can sue and be sued on such contracts as though she were a single woman. So can a woman, married before 1883, in respect of property, the title to which has vested in her since 1882. Indeed, if the contract be made since December 5th, 1893, it is wholly immaterial whether at the date of the contract she had any separate property or not. Should an action be successfully brought against her for damages for breach of contract, the judgment against her can be enforced against any separate property of which she is possessed at the date of judgment. The other

[1] 13.
[2] Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 40.
[3] *Bell* v. *Stocker* (1882), 10 Q. B. D. 129.
[4] *Capel* v. *Powell* (1865), 17 C. B. N. S. 743; *Cuenod* v. *Leslie*, [1909] 1 K. B. 880.
[5] *Head* v. *Briscoe* (1833), 5 C. & P. 485; *Uttley* v. *Mitre Publishing Co.* (1901), 17 Times L. R. 720.
[6] 33 & 34 Vict. c. 93; 37 & 38 Vict. c. 50; 45 & 46 Vict. c. 75; 56 & 57 Vict. c. 63; 8 Edw. VII. c. 27.

party to the contract can only make the husband liable for his wife's contracts on the ground that she was his agent. Such agency may be implied from the circumstance that the parties are living together;[1] but in such a case the agency is limited to necessaries.[2] What are necessaries is a question of fact, to be determined according to the social and financial position of the parties, as to which their mode of living is a test. But things which are ordinarily necessary are not "necessaries," if ordered in excessive quantities or if the married woman is already sufficiently supplied with them.[3]

The implied agency may be revoked by the husband.[4] Tradesmen, who have already supplied goods on the order of the wife for which the husband has paid, may continue to act upon such authority until they have received express notice of its determination;[5] in other cases, however, the revocation is sufficient, though only communicated to the wife. If the husband pays a definite sum of money regularly to the wife for household and other necessaries, no implied agency arises.[9]

If the wife in fact contracted as agent for her husband, the tradesman cannot sue her; it is immaterial that he did not know that she contracted as agent.[7] If, however, she contracted otherwise than as agent, she may be liable. The tradesman cannot look to both. If he sues the wife and recovers judgment against her he cannot afterwards sue the husband.[8]

The jury have not to decide whether goods supplied were "necessaries" proper to the wife's station in life, but whether in the particular case she had authority to pledge her husband's credit.[9] "If husband and wife are living together, that is a presumption of fact from which the jury may infer that the husband really did give his wife such authority. But

[1] *Manby* v. *Scott* (1659), 2 Sm. L. C., 11th ed., 446.
[2] *Montague* v. *Benedict* (1825), 2 Sm. L. C., 11th ed., 476.
[3] *Seaton* v. *Benedict* (1828), 2 Sm. L. C., 11th ed., 482.
[4] *Jolly* v. *Rees* (1863), 15 C. B. N. S. 628.
[5] *Debenham* v. *Mellon* (1880), 6 App. Cas. 24.
[6] *Slater* v. *Parker* (1908), 24 Times L. R. 621. Savings made by the wife out of such an allowance belong to the husband: *Birkett* v. *Birkett* (1908), 98 L. T. 540.
[7] *Paquin* v. *Beauclerk*, [1906] A. C. 148.
[8] *Morel Brothers* v. *Earl of Westmoreland*, [1904] A. C. 11; *French* v. *Howie*, [1905] 2 K. B. 580.
[9] See *Reid* v. *Teakle* (1853), 13 C. B. 627.

even then I do not think that the authority would arise so long as he supplied her with the means of procuring the articles otherwise."[1] The fact that she was already supplied with similar goods would be admissible evidence.[2]

Where husband and wife live together, and he will not supply her with necessaries or the means of obtaining them, she has at common law the right to pledge his credit for her own support,[3] but not to borrow money to buy necessaries.[4]

Where husband and wife live apart by mutual consent, the husband is not liable to tradesmen for goods supplied to the wife, if he makes her a sufficient allowance; it is immaterial whether the tradesman knows of the allowance or not.[5] But even where the wife has *primâ facie* no authority to pledge her husband's credit, evidence may be given to show that he has sanctioned or adopted the transaction, and so ratified the contract.[6] Where husband and wife live apart, there is no presumption that she has authority to bind her husband "even for necessaries suitable to her degree in life; it is for the plaintiff to show that, under the circumstances of the separation or from the conduct of her husband, she had such authority."[7] Where husband and wife separate by mutual consent, and the income agreed to be paid to the wife proves insufficient for her support, she has no authority to pledge her husband's credit.[8] There can be no agency, if he provides for her or if she has the means to provide for herself.

Whenever a wife is living apart from her husband, her authority to bind him for necessaries is determined by her adultery,[9] unless the husband forgives her and takes her back again,[10] or has connived at the adultery,[11] or had expressly authorised her to procure the goods.[12]

If the husband has deserted his wife,[13] or turned her out of doors, or has caused her, from reasonable apprehension of cruelty, to leave him, or by his indecent conduct has precluded her from living with him,[14] and does not give her adequate means of subsistence according to his degree in life and his fortune, the law gives her authority "to order such things as are

[1] *Per* Lord Blackburn in *Debenham* v. *Mellon* (1880), 6 App. Cas. at p. 36.
[2] *Reneaux* v. *Teakle* (1853), 8 Exch. 680.
[3] See the judgment of Bayley, J., in *Montague* v. *Benedict* (1825), 2 Sm. L. C., 11th ed., at pp. 478, 479.
[4] *Knox* v. *Bushell* (1857), 3 C. B. N. S. 334; *In re Cook* (1892), 10 Morr. Bankcy. Rep. 8.
[5] *Dixon* v. *Hurrell* (1838), 8 C. & P. 717; *Reeve* v. *Marquis of Conyngham* (1847), 2 C. & K. 444.
[6] *Emmett* v. *Norton* (1838), 8 C. & P. 511; *Waithman* v. *Wakefield* (1807), 1 Camp. 120.
[7] *Per* Abbott, C. J., in *Mainwaring* v. *Leslie* (1826), Moo. & M. at p. 18; and see *Clifford* v. *Laton* (1827), *ib.*, 101.
[8] *Eastland* v. *Burchell* (1878), 3 Q. B. D. 432.
[9] *Govier* v. *Hancock* (1796), 6 T. R. 603; *Wilson* v. *Glossop* (1888), 20 Q. B. D. 354.
[10] *Cooper* v. *Lloyd* (1885), 6 C. B. N. S. 519.
[11] *Wilson* v. *Glossop*, *supra*.
[12] See the remarks of Cockburn, C. J., in *Atkyns* v. *Pearce* (1857), 2 C. B. N. S. at p. 767.
[13] *Bolton* v. *Prentice* (1745), 2 Stra. 1214.
[14] *Bazeley* v. *Forder* (1868), L. R. 3 Q. B. 559, 562.

reasonable and necessary for herself, but not to go into any extravagance, or to pledge his credit for anything beyond what would be reasonable and necessary for her subsistence." [1] "If a man turns his wife out of doors, he sends with her credit for her reasonable expenses." [2] Moreover, a husband is, under such circumstances, bound to repay to a third person any money advanced by him to the wife to be expended by her in the purchase of necessaries.[3]

On the other hand, if a "wife voluntarily abandons and relinquishes her family, by this conduct she places herself without the pale of her husband's maintenance." [4] A tradesman, therefore, cannot recover from the husband the price of necessaries supplied to his wife whilst she is living apart from him against his will, unless proof be given that he has expressly assented to his wife's contract.[5]

By 20 & 21 Vict. c. 85, s. 26, where upon a judicial separation "alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use."

In most of the decisions which we have quoted above, the husband and wife are regarded as though they stood to each other merely in the relation of principal and agent. The wife, it was said, was an agent who expressly divested herself of personal liability.[6] Yet, as we have just seen, a husband is often held liable on a contract made by his wife in cases where she clearly was not his agent to make it—where, for instance, he had expressly forbidden her to pledge his credit or had driven her from his house. It is surely more accurate to say that the husband incurs this responsibility by the mere fact of marriage. She is his wife, and therefore he must maintain her for the rest of their wedded lives, so long as she is a true wife to him. This liability is wholly independent of any contract between them; it depends in fact upon her status as his wife, and not upon any agency, express or implied.

The husband takes on himself the duty of supplying his wife with necessaries according to his estate and condition in life. "If she is compelled by his misconduct to procure the necessary articles for herself—as,

[1] *Per* Lord Abinger, C. B., in *Emmett* v. *Norton* (1838), 8 C. & P. at p. 510.
[2] *Per* Lord Eldon in *Rawlyns* v. *Vandyke* (1800), 3 Esp. at p. 250.
[3] *Davidson* v. *Wood* (1863), 1 De G. J. & S. 465, approved by Bramwell, L. J., in *Drew* v. *Nunn* (1879), 4 Q. B. D. at p. 663.
[4] *Manby* v. *Scott* (1659), 2 Sm. L. C., 11th ed., 446.
[5] *Hindley* v. *Marquis of Westmeath* (1827), 6 B. & C. 200.
[6] *Smout* v. *Ilbery* (1842), 10 M. & W. 1, 12.

for instance, if he drives her from his house, or brings improper persons into it, so that no respectable woman could live there—according to the decided cases, he gives her authority to pledge his credit for her necessary maintenance elsewhere, which means that the law gives that authority by force of the relation of husband and wife. So, if a husband omit to furnish his wife with necessaries while living with him, she may procure them elsewhere, otherwise she would perish. . . . If the husband becomes lunatic by the visitation of God and therefore unable to provide his wife with necessaries, he is in the same situation as a husband omitting to furnish them ; and as by the relation which he originally contracted he undertook to provide her with them himself, he becomes liable to any person who does it for him."[1] "The true principle seems to be that when a man marries he contracts an obligation to support his wife ; and, in point of law, he gives her authority to pledge his credit for her support, if circumstances render it necessary, she herself not being in fault."[2]

On somewhat similar grounds it has been held that a husband is liable for the necessary expenses for the decent interment of his wife, who at the time of her death was living separate from him, although such expenses were incurred, and in the first instance defrayed, by the plaintiff, a mere volunteer, without any prior communication with the husband, so that he was in no sense the agent of the husband. "An undertaker who conducts a funeral may recover from the executor of the deceased (having assets) the reasonable and necessary expenses of such funeral without any specific contract. That liability in the executor is founded upon the duty imposed upon him by the character which he fills, and a proper regard to decency and to the comfort of others. . . . The same reasons cast an equal responsibility upon the husband of a deceased wife," such responsibility being directly referable to the character with which he is invested.[3] So a widow, even though an infant, has been compelled to pay the expenses of the funeral of her husband, who left no property.[4]

In the well-known case of *Smout* v. *Ilbery*[5] the law of principal and agent was too strictly applied to a case of husband and wife, and serious injustice followed. There the plaintiff, a tradesman, had supplied goods to Mrs. Ilbery with her husband's knowledge and consent, and continued to do so after her husband had left home. He died abroad and goods were subsequently supplied without either party being aware of his death. It was held that Mrs. Ilbery was not personally liable for the price of goods supplied under such circumstances. But the Court also expressed the opinion that her agency was determined immediately on the death of her husband, and that therefore his estate also was not liable.[6]

[1] *Per* Alderson, B., in *Read* v. *Legard* (1851), 6 Exch. at p. 642.
[2] *Per* Pollock, C. B., *ib.*, at p. 642.
[3] *Per* Jervis, C. J., in *Ambrose* v. *Kerrison* (1851), 10 C. B. at p. 779 (citing *Jenkins* v. *Tucker* (1788), 1 H. Bl. 91) ; and see *Bradshaw* v. *Beard* (1862), 12 C. B. N. S. 344.
[4] *Chapple* v. *Cooper* (1844), 13 M. & W. 252, 258.
[5] (1842), 10 M. & W. 1.
[6] See also *Blades* v. *Free* (1829), 9 B. & C. 167 ; *Campanari* v. *Woodburn* (1854), 15 C. B. 400.

In the subsequent case of *Drew* v. *Nunn*,[1] however, where goods were supplied to the defendant's wife after he had become insane, but before the plaintiff was aware of the fact, it was held that the husband was liable, although agency is revoked by insanity as well as by death.[2] It may be doubted, therefore, whether the *dicta* in *Smout* v. *Ilbery*[3] are good law.[4] It might be argued on the authority of *Yonge* v. *Toynbee*[2] that Mrs. Ilbery was liable on a warranty of authority.

Before the Married Women's Property Act, 1870,[5] a married woman was not liable for the maintenance of her husband, children or relations. The law is now contained in the Married Women's Property Acts, 1882[6] and 1908,[7] which enact that a married woman having separate estate shall be liable for the maintenance of her husband, children, grandchildren or parents in all respects as if she were a *feme sole*, should any of them become chargeable to the parish.

At common law a husband and wife could not contract with each other, for they were deemed to be one person. But this disability was removed in equity so far as concerned the wife's separate estate or in respect of contracts relating to matrimonial rights. A husband and wife can make a valid contract for immediate separation, but a contract for future separation was, and is, illegal and void. Where a wife enters into a contract for the benefit of her husband, it is the duty of the other party to the contract, if he seeks to enforce it, to show that the wife did not act under the undue influence of her husband.[8]

A judgment against a man, a spinster or a widow, is a judgment against them personally; but a judgment against a married woman is against her separate property, not against her, and only against such portion of her separate property as is liable to be taken in execution. Such a judgment, therefore, cannot be enforced against any property which is subject to a restraint on anticipation, whether her interest in such property be legal or equitable, whether created by the Married Women's Property Acts or not.[9] The judgment creditor cannot even touch accumulations of income which have accrued due since the date of the judgment,[10] though he can seize

[1] (1879), 4 Q. B. D. 661.
[2] *Yonge* v. *Toynbee*, [1910] 1 K. B. 215.
[3] (1842), 10 M. & W. 1.
[4] See *Salton* v. *New Beeston Cycle Co.*, [1900] 1 Ch. 43; *Richardson* v. *Du Bois* (1869), L. R. 5 Q. B. 51.
[5] 33 & 34 Vict. c. 93, ss. 13, 14.
[6] 45 & 46 Vict. c. 75, ss. 20, 21; and see *Griffiths* v. *Fleming*, [1909] 1 K. B. 805.
[7] 8 Edw. VII. c. 27, s. 1, thus destroying the rule laid down in *Guardians of Pontypool* v. *Buck*, [1906] 2 K. B. 896.
[8] *Chaplin* v. *Brammall*, [1908] 1 K. B. 233.
[9] See the form of the judgment in *Scott* v. *Morley* (1887), 20 Q. B. D. 120; and see *Downe* v. *Fletcher* (1888), 21 Q. B. D. 11; *Axford* v. *Reid* (1889), 22 Q. B. D. 548.
[10] *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48.

income which had accrued due at the time when judgment was recovered.[1] Thus the clause restraining anticipation, which was devised to protect a married woman from her husband, has become a means of unfairly defeating her creditors. Where, however, a married woman brings an action or counterclaim and fails, the Court may order the costs of her opponent to be paid out of property subject to a restraint on anticipation.[2]

[1] *Hood-Barrs* v. *Heriot*, [1896] A. C. 174.
[2] See 56 & 57 Vict. c. 63, s. 2 ; *Hood-Barrs* v. *Cathcart* (2), [1895] 1 Q. B. 873.

## Chapter II.

### INFANTS.

By the law of England every person under the age of twenty-one is an infant.[1] No means exists whereby an infant can attain his majority before or after that age.

An infant can commit a tort, but he cannot as a rule be guilty of a crime until he has passed the age of fourteen years. Some contracts made by an infant are valid, some are void; others are voidable at his option. He may be employed by an adult as his agent, and in that capacity he can bind his principal as fully as if he himself were of age. He can be a bailee and a partner in a firm, but he cannot be made a bankrupt.[2] He cannot make a binding admission, nor can he "settle an account."[3] A boy over the age of fourteen years, and a girl over the age of twelve, can contract a valid marriage, even without the consent of their parents; but they will be liable to penal consequences if they obtain a marriage licence by swearing falsely that they are of full age.[4]

An infant may own land, but he cannot dispose of it;[5] he cannot make a will or execute a deed;[6] he cannot act as an executor or an administrator. An infant is always under guardianship; he is often a ward of Court, but if not, he is under the guardianship either of his father or of his mother or of some other person appointed by his parents or by the Court. He cannot bring or defend an action without the assistance of an adult.

[1] The King attains his majority at the age of eighteen.

[2] See *post*, pp. 1389, 1390.

[3] *Trueman* v. *Hurst* (1785), 1 T. R. 40; and see *ante*, p. 940.

[4] See *ante*, p. 191; 19 & 20 Vict. c. 119, ss. 2, 18; and *R.* v. *Smith* (1865), 4 F. & F. 1099.

[5] An infant over the age of fifteen years can, however, dispose of gavelkind land by feoffment.

[6] To this there are some statutory exceptions. A young man over twenty, and a girl over seventeen, years of age may, with the sanction of the Court, make a valid settlement in contemplation of marriage: 18 & 19 Vict. c. 43; and see 2 Williams' Vendor and Purchaser, p. 792.

It is the duty of a parent to provide his infant children with suitable maintenance and education; but this duty "is of imperfect obligation, and its direct enforcement may be difficult or impossible." [1]

It will be noticed that the disabilities of an infant differ in their nature from those of a married woman. The latter's position is always considered with relation to her husband. An infant, on the other hand, is considered as an individual standing alone, who by reason of his age and inexperience requires the protection of the law. This protection is afforded to him in many ways, among which we may notice the provisions of the Betting and Loans (Infants) Act, 1892,[2] which make it a misdemeanour for anyone to send to any infant circulars or other documents inviting him to make any bet or wager or to borrow money.

An infant because of his immaturity is often exempted from responsibility for acts which would be criminal if done by an adult. Thus an infant under seven years of age cannot be guilty of a crime; he is presumed to be incapable of forming a criminal intent, and this presumption cannot be rebutted. Between the years of seven and fourteen an infant is still presumed to be incapable of forming a criminal intention, but such presumption may be rebutted; for, if the prosecution can establish that the infant knew that what he was doing was wrong, he may be convicted.[3] In such a case, it is said, "*malitia supplet aetatem.*" "Whenever a person committing a felony is under fourteen years of age, the presumption of law is that he or she has not sufficient capacity to know right from wrong, and such person ought not to be convicted unless there be evidence to satisfy the jury that the party, at the time of the offence, had a guilty knowledge that he or she was doing wrong."[4] In other words, it is not to be presumed that a boy under fourteen intended or even contemplated the necessary consequences of his act. It does not follow from proof that a criminal act was done that there was a criminal intention

[1] *Per* Buckley, J., in *Waterhouse* v. *Waterhouse* (1906), 94 L. T. at p. 134.
[2] 55 Vict. c. 4, ss. 1, 2 & 3; *Milton* v. *Studd*, [1910] 2 K. B. 118.
[3] He can no longer be sentenced to death: see Children Act, 1908 (8 Edw. VII. c. 67), s. 103.
[4] *Per* Littledale J., in *R.* v. *Owen* (1830), 4 C. & P. at p. 237.

in the infant's mind. Further evidence must be given to show that the infant knew that he was doing wrong; such evidence may be afforded by the particular circumstances of the case before the Court. But the law deems a boy under fourteen incapable of committing a rape or an assault with intent to commit a rape. If, however, he assists a third person to commit a rape, he may be convicted as a principal in the second degree if he be over seven years of age.[1] An infant between the age of fourteen and twenty-one years is responsible to the criminal law to the same extent as an adult.[2] To this rule there are two exceptions: where the offence with which he is charged consists of a mere non-feasance, such as the non-repair of a highway, he is exempt from liability because he has not yet command of his fortune. Again, as an infant cannot be made a bankrupt, he cannot be convicted of any crime under the Debtors Act, 1869,[3] which can only be committed by a person properly adjudicated bankrupt.[4]

Where an infant is responsible for a criminal act, it is no defence for him to plead that he did it under the coercion of his father or mother. Only a wife can set up coercion as a defence to a criminal charge. The fact of the coercion will, however, be taken into consideration in determining the punishment to be inflicted upon the infant.

An infant may always sue to recover damages for a tort committed against him. Although he is not liable on many of his contracts, he may lawfully trade, and if he does so he can recover damages for a slander on him in the way of his trade.[5] So he is liable to an action whenever he commits a tort. Infancy is no defence to an action of tort,[6] except perhaps where a particular intention is an essential ingredient in the cause of action and the defendant is too young to be capable of forming such an intention.

[1] See *ante*, p. 319.
[2] Thus he can be a bailee, and is liable for any offence he may commit in such capacity: *R.* v. *McDonald* (1885), 15 Q. B. D. 323.
[3] 32 & 33 Vict. c. 62.
[4] *R.* v. *Wilson* (1879), 5 Q. B. D. 28.
[5] *Wild* v. *Tomkinson* (1827), 5 L. J. K. B. 265.
[6] *Defries* v. *Davis* (1835), 7 C. & P. 112.

A plaintiff whose cause of action is really founded on contract will not be allowed to frame his action in tort, so as to evade the difficulty created by the infant's non-liability on a contract.

Thus, where an infant hired a horse and injured it by over-riding, the owner of the horse was not allowed to sue in tort for damages, which were caused by the infant's breach of an implied term of the contract.[1] But the case is different where an infant hires a horse for riding and injures it by putting it at a fence, although he has been expressly forbidden by the owner to do so ; for here the tort does not arise out of the contract, but is independent of it.[2]

The fact that an infant has been assaulted, seduced or defamed does not of itself give the parents any right of action. If, however, the tort deprives the parent of services which the infant should render, an action on the case may lie for the special damage thus wrongfully inflicted, provided it be the natural and probable consequence of the defendant's act or words. A child will be held to be the servant of its parents, if it is old enough to be capable of rendering them any act of service.[3]

The law divides contracts entered into by infants into three separate classes :—

(i.) Contracts for the supply of necessaries. Such contracts are not affected by the Infants Relief Act, 1874,[4] and therefore remain valid as they were at common law.

(ii.) Contracts "for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants." Such contracts under the common law were voidable at the option of the infant, and were declared absolutely void by section 1 of the Infants Relief Act, 1874.

(iii.) Other contracts to which section 1 of the Infants Relief Act, 1874, does not refer.

(i.) If an infant is party to a contract, it is not necessarily void or even voidable. The law has always recognised that the protection which is necessary to the welfare of an infant may be defeated, if all contracts with him could be repudiated as he pleased. An infant requiring the necessaries of life might be denied them if the persons who supply such

[1] *Jennings* v. *Rundall* (1799), 4 T. R. 335.
[2] *Burnard* v. *Haggis* (1863), 14 C. B. N. S. 45.
[3] *Dixon* v. *Bell* (1816), 5 Maule & S. 198 ; *Hall* v. *Hollander* (1825), 4 B. & C. 660, *ante*, p. 560 ; *R.* v. *The Inhabitants of Chillesford* (1825), 4 B. & C. at p. 102 ; *Harris* v. *Butler* (1837), 2 M. & W. at pp. 542, 543 ; *Evans* v. *Walton* (1867), L. R. 2 C.P. 615.
[4] 37 & 38 Vict. c. 62.

wants had no right to require payment for necessaries supplied on credit.

An infant may bind himself by a contract for the supply of food, raiment, lodging and the like. Instruction in art or trade, and intellectual, moral, and religious education may also be necessaries.[1] Again, the retainer of a solicitor or the attendance of a medical man or of a man-servant may be the subject of a valid contract by an infant; and the expenses of the marriage settlement of an infant may properly be deemed necessaries.[2]

But, though things which fall within any of the classes above mentioned may be necessaries, yet there is wide variance according to the condition in life of the infant in each particular case. His clothes may be fine or coarse, according to his rank or the probable extent of his means when he comes of age; his education may vary according to the station he is to fill; and the medicines chargeable to him as necessaries will depend on the illness with which he is afflicted.[3] The Sale of Goods Act, 1893,[4] enacts that where goods of the nature of necessaries are sold to an infant he must pay a reasonable price therefor, and defines necessaries as goods suitable to the condition of life of the infant, and to his actual requirements at the time of the sale and delivery.

Hence when an infant is sued for goods supplied to him on credit, evidence may be given that he was already supplied with goods of a similar description, for the purpose of showing that they were not necessaries, and it is immaterial whether the plaintiff did or did not know of such supply.[5] The extent of necessary attendance will similarly depend on the infant's position in society: a rich infant may be allowed a servant in livery. "Articles of mere luxury are always

[1] Co. Litt. 172 a; *Walter* v. *Everard*, [1891] 2 Q. B. 369; *Green* v. *Thompson*, [1899] 2 Q. B. 1.

[2] *Helps* v. *Clayton* (1864), 17 C. B. N. S. 553; *In re Jones*, [1883] W. N. 14.

[3] *Hart* v. *Prater* (1837), 1 Jur. 623.

[4] 56 & 57 Vict. c. 71, s. 2; and see *ante*, pp. 1352, 1353.

[5] See *Johnstone* v. *Marks* (1887), 19 Q. B. D. 509, following *Barnes* v. *Toye* (1884), 13 Q. B. D. 410, dissenting from *Ryder* v. *Wombwell* (1868), L. R. 4 Ex. 32.

excluded, though luxurious articles of utility are in some cases allowed."[1]

Contracts for charitable assistance to others, though praiseworthy, cannot be enforced, because they do not relate to the infant's own personal advantage. Nevertheless, an infant widow was held liable on her contract to pay for her husband's funeral, such an expense being held to be reasonably necessary.[1]

"All such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one; and for such matters, therefore, an infant cannot be made responsible. But if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved; if they were, for such articles the infant may be responsible."[2] At the trial the jury must decide whether they are such as reasonable persons of the age and station of the infant would require for real use. The defence of infancy must always be specially pleaded. In an action against an infant for necessaries it is for the plaintiff to prove, not only that the goods supplied were suitable to the condition in life of the infant, but that he was not sufficiently supplied with goods of that class at the time of the sale and delivery.[3] There may be a preliminary question for the judge whether there is any evidence on which the jury can properly find for the plaintiff, on whom the burden of proof lies; if not, the judge should direct a verdict for the defendant.[4]

(ii.) Certain contracts made by an infant have been declared void by the Infants Relief Act, 1874, which enacts that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries), and all accounts stated with infants shall be absolutely void: provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable."[5]

It is submitted that as these contracts are declared by the statute to be "absolutely void," they are not binding on either

[1] *Chapple* v. *Cooper* (1844), 13 M. & W. 252, 258.
[2] *Per* Parke, B., in *Peters* v. *Fleming* (1840), 6 M. & W. 47, followed in *Ryder* v. *Wombwell*, *suprà*.
[3] *Nash* v. *Inman*, [1908] 2 K. B. 1.
[4] *Ryder* v. *Wombwell*, *suprà*; and see *Nash* v. *Inman*, *suprà*.
[5] 37 & 38 Vict. c. 62, s. 1. The concluding proviso appears to be superfluous, as a the contracts mentioned in the earlier portion of the section were voidable at law.

party, they cannot be ratified by either party,[1] and the property in the goods to which they relate will not pass to the infant.

It is immaterial that the other party to the contract was not aware that he was contracting with an infant, and so far as the contract is concerned it is immaterial that the infant expressly represented himself to be of full age, though by so doing he may expose himself to an action of tort for fraudulent misrepresentation.[2]

(iii.) Contracts, which are not for the supply of necessaries and which do not fall within the scope of section 1 of the Infants Relief Act, 1874, were as a rule voidable at common law. But they were voidable only at the instance of the infant or those who claimed under him. If an infant made such a contract with an adult, the adult was bound by it, though the infant was not;[3] and it is still law that the infant can sue him, though he cannot sue the infant if the latter chooses to plead his infancy.[4] An infant cannot, however, obtain specific performance of the contract; for specific performance will never be granted where the remedy for any breach of contract is not mutual.[5]

But an infant cannot avoid a contract of which he has enjoyed the benefit,[6] or which, at the time of his entering into it, was clearly for his benefit. "The fact that a person under age may be in full possession of his faculties and earning the wages of a man does not affect the law applicable to a contract made by him. Whenever such a contract comes before a Court of law, the question whether it was for the benefit of the infant has to be considered, and the contract will not be enforced unless the Court is of opinion that it was for the benefit of the infant."[7] The contract, however, may

[1] *In re Onslow's Trusts* (1875), L. R. 20 Eq. 677.

[2] *Cannam* v. *Farmer* (1849), 3 Exch. 698; *Levene* v. *Brougham* (1909), 25 Times L. R. 265.

[3] *Holt* v. *Ward Clarencieux* (1733), 2 Str. 937.

[4] *Prince* v. *Haworth*, [1905] 2 K. B. 768.

[5] *Flight* v. *Bolland* (1828), 4 Russ. 298.

[6] *Valentini* v. *Canali* (1889), 24 Q. B. D. 166; *Hamilton* v. *Vaughan-Sherrin, &c., Co.*, [1894] 3 Ch. 589.

[7] *Per* Collins, M. R., in *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K. B. at p. 229; and see *Corn* v. *Mathews*, [1893] 1 Q. B. 310; *Long & Co.* v. *Andrews*, [1909] 1 Ch. 763.

be severable, and in such a case it will only be voidable as to such part as is not for the benefit of the infant.[1]

Thus, if an infant binds himself by bond or other writing with a penalty to pay even for necessaries, that obligation will not bind him, although an action may lie against him for the price of the necessaries; it is not for the benefit of an infant that he should bind himself to pay a penalty. "An infant cannot make himself liable by the custom of merchants either by a bill of exchange or a promissory note." If he gives a bill to secure the payment of the price of necessaries, he cannot be sued on it, though he may be sued on the original contract for the supply of them.[2]

A contract by an infant, binding him to serve during a certain time for wages, but enabling the master to stop the work whenever he chose, and to retain the wages during stoppage, was held inequitable and void against the infant.[3] Again, in *Flower* v. *L. & N. W. Ry. Co.*,[4] an infant was held not to be bound by a contract to forego any right of action he might have against the defendants, if they were guilty of negligence in carrying him as a passenger.

But, on the other hand, in *Clements* v. *L. & N. W. Ry. Co.*,[5] an infant's contract to become a member of, and to be bound by the rules of, the insurance society formed among the defendants' employés, under which rules the amounts recoverable for temporary or permanent relief were less than the limits recoverable under the Employers' Liability Act, was held to be a proper one for an infant to have entered into.

An infant cannot be sued on a covenant to serve his master contained in an apprenticeship deed,[6] hence it is usual to add his father or some other person who enters into engagements on his behalf; but a contract of employment under which he earns his living may be enforced against him.[7] The Workmen's Compensation Act, 1897,[8] which includes apprentices under the general word 'workman,' does not affect the law as to infants' contracts. Where an infant recovered the maximum amount payable to him under that Act by his employers for personal injuries caused by their negligence, it was held that his acceptance of that sum was no bar to the bringing of a subsequent action for negligence; for an infant is not bound by any compromise into which he enters, unless it is clearly for his benefit.[9]

By section 2 of the Infants Relief Act, 1874, it is provided

[1] *Bromley* v. *Smith*, [1909] 2 K. B. 235.
[2] *In re Soltykoff*, [1891] 1 Q. B. 413: see Co. Litt. 172 a.
[3] *R.* v. *Lord* (1850), 12 Q. B. 757.
[4] [1894] 2 Q. B. 65.
[5] [1894] 2 Q. B. 482.
[6] *De Francesco* v. *Barnum* (1889), 45 Ch. D. 430.
[7] *Evans* v. *Ware*, [1892] 3 Ch. 502.
[8] 60 & 61 Vict. c. 37, now repealed and replaced by the Workmen's Compensation Act, 1906 (6 Edw. VII. c. 58).
[9] *Stephens* v. *Dudbridge Ironworks Co.*, [1904] 2 K. B. 225. The amount which he had received under the Act was deducted from the damages awarded him by the jury.

that "no action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age."

This section applies to all voidable contracts, *inter alia* to a promise of marriage. Thus, where an infant promises to marry, and on attaining his majority, merely continues his affectionate conduct and maintains his engagement, this is a mere ratification, and no action for breach of promise can be sustained.[1] But a new contract identical with the old would be binding.[2]

An infant, who with two others became indebted to a firm of brokers, was sued on attaining his majority. He compromised the action by giving two acceptances for £50, one of his co-defendants giving an acceptance for £80, and the other being discharged from the action. One of the defendant's bills to the brokers was endorsed by them to plaintiff, who took it with full notice of all the circumstances. It was held that the transaction was void.[3]

The Betting and Loans (Infants) Act, 1892,[4] which seeks "to make penal the inciting infants to betting or wagering or to borrowing money," enacts that where an "infant who has contracted a loan which is void in law agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement (and any instrument given in pursuance of and for carrying into effect such agreement or otherwise in relation to the payment of money representing or in respect of such loan) shall, so far as it relates to money which represents or is payable in respect of such loan and is not a new advance, be absolutely void."

On the other hand, there are other kinds of contracts made by an infant which are binding upon him unless he repudiates them before, or within a reasonable time after, he attains his majority. These are contracts under which the infant has acquired some permanent property or interest, such as a contract for the purchase of real property or of shares in a company,[5] or to enter into a partnership,[6] or to become a

[1] *Coxhead* v. *Mullis* (1878), 3 C. P. D. 489.
[2] *Ditcham* v. *Worrall* (1880), 5 C. P. D. 410; and see *Northcote* v. *Doughty* (1879), 4 C. P. D. 385.
[3] *Smith* v. *King*, [1892] 2 Q. B. 543; and see *Ex parte Kibble*, *In re Onslow* (1875), L. R. 10 Ch. 373.
[4] 55 Vict. c. 4, s. 5.
[5] *N. W. Ry. Co.* v. *M'Michael* (1850), 5 Exch. 114.
[6] *Goode* v. *Harrison* (1821), 5 B. & Ald. 147.

member of a building society.[1] And the same rule applies to benefits which an infant takes under a marriage settlement.[2] Agreements of this kind, which involve considerable and continuing obligations, are binding unless repudiated within a reasonable time after the infant comes of age.[3] What is a reasonable time must be decided from the circumstances: in cases where the infant has received no benefit from the agreement and where delay has not injured the position of other parties, a considerable period may be allowed. In one case a lady, who had made during infancy a marriage settlement from which she never received any benefit, was allowed to repudiate it thirty-seven years afterwards.[4]

If an infant avoids a contract before receiving consideration, he is entitled to recover money paid by him thereunder.[5]

Thus an infant, who subscribed for shares in a company, but received no dividend, on repudiation of the contract was permitted upon the liquidation of the company to prove for the amount which she had paid.[6] On the other hand an infant, who had paid money for the use of a furnished house and had used the house, was not allowed to recover the money although the contract was void.[7]

An infant sues by his next friend and defends by a guardian *ad litem*.[8] The next friend is personally liable for the costs of the action, but the infant is *primâ facie* liable to indemnify him against costs properly incurred on behalf of the infant. The Court must, however, be "satisfied that the litigation has been prompted by motives of benevolence towards the infant, and has been conducted in his interest and with diligence and propriety."[9] And when any property of the infant is being administered by the Court, a declaration can be made charging such property with all costs properly incurred by the next friend.[10] The guardian *ad litem* is not personally liable for costs, unless he has been guilty of misconduct.

[1] *Whittingham* v. *Murdy* (1889), 60 L. T. 956; but see *Nottingham Building Society* v. *Thurston*, [1903] A. C. 6.
[2] *Edwards* v. *Carter*, [1893] A. C. 360.
[3] *Dublin, &c., Ry. Co.* v. *Black* (1852), 8 Exch. 181.
[4] *In re Jones, Farrington* v. *Forrester*, [1893] 2 Ch. 461. But marriage settlements made with the sanction of the Court will be binding: see 18 & 19 Vict. c. 3.
[5] *Corpe* v. *Overton* (1833), 10 Bing. 252, overruling *Holmes* v. *Blogg* (1817), 8 Taunt. 508.
[6] *Hamilton* v. *Vaughan-Sherrin, &c., Co.*, [1894] 3 Ch. 589.
[7] *Valentini* v. *Canali* (1889), 24 Q. B. D. 166.
[8] Order XVI., rr. 18, 19; Order LXV., r. 13.
[9] *Per* Eve, J., in *Steeden* v. *Walden*, [1910] 2 Ch. at p. 400.
[10] *Taner* v. *Ivie* (1752), 2 Vesey, senr., 466; *Nalder* v. *Hawkins* (1833), 2 Mylne & K. 243, 247; *Pritchard* v. *Roberts* (1873), L. R. 17 Eq. 222.

If an infant defendant omits to deny an allegation contained in the statement of claim, he cannot be taken to have made any admission; therefore judgment cannot be signed against him under Order XXXII., r. 6. He must be served with notice of trial, and the action will be set down for trial in the ordinary way.

"In any cause or matter in the King's Bench Division, in which money or damages is or are claimed by or on behalf of an infant or a person of unsound mind not so found by inquisition, no settlement or compromise or acceptance of money paid into Court, whether before or at or after the trial, shall be valid without the sanction of the Court or a judge, and no money or damages recovered or awarded in any such cause or matter, whether by settlement, compromise, payment into Court or otherwise, before or at or after the trial, shall be paid to the next friend of the plaintiff or to the plaintiff's solicitor unless the Court or a judge shall so direct. All money or damages so recovered or awarded shall, unless the Court or a judge shall otherwise direct, be paid to the Public Trustee and shall, subject to any general or special directions of the Court or a judge, be held and applied by him, subject to any general or special directions of the Court or a judge, in such manner as he shall think fit for the maintenance and education, or otherwise for the benefit of the plaintiff. The provisions of this rule shall also apply to all actions in which damages are claimed or awarded or recovered by or on behalf of an infant or person of unsound mind not so found by inquisition under the Fatal Accidents Act, 1846.[1] Nothing in this rule shall prejudice the lien of a solicitor for costs."[2] Similar provision is made by the Workmen's Compensation Act, 1906,[3] to protect the interests of infant workmen who are entitled to compensation under the Act.

[1] 9 & 10 Vict. c. 93.
[2] Order XXII., r. 15.
[3] 6 Edw. VII., c. 58, Sched. II., rr. 9, 10.

## Chapter III.

### LUNATICS.

As a general rule, no transaction is binding in law upon any person whose mind did not go with his act. Still less will a man be bound by his act if he had no mind capable of understanding the transaction or of forming an intention. No will or grant of property is valid if the person who made it was incapable of understanding the nature of his act. It will be a defence even to criminal proceedings if the person who committed the criminal act did not know what he was doing or did not know that what he was doing was wrong. But a still greater degree of insanity—different in character as well as in extent—is necessary before the law will deprive the insane person of his liberty and order him to be confined in an asylum.

Another distinction has always been recognised by both the legal and medical professions. Some persons are born of unsound mind and remain so all their lives without any lucid interval; these are called idiots. Others are born of sound mind, but subsequently become deranged by some disease or accident; these are called lunatics. In the latter case the derangement often is not permanent; there are frequent lucid intervals.[1] And the derangement at other times is not always total; the lunatic may be insane upon one or more subjects, but sane on others.

As to these cases of "partial delusion" a decided difference of opinion exists between the legal and the medical professions.[2] Medical men as a rule assert that no man whose mind is unhinged in any particular

[1] Special statutes have been passed for the protection from outrage of female idiots and imbecile women and girls: Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 5; Lunacy Act, 1890 (53 Vict. c. 5), s. 324. The word "imbecile" in these statutes includes a lunatic during a lucid interval: *R.* v. *F*—— (1910), 74 J. P. 384.

[2] See an excellent treatise on the Criminal Responsibility of Lunatics, by H. Oppenheimer, M.D., LL.D., who strives to reconcile the opposing views of the two professions.

should be regarded as responsible—or, at all events, as criminally responsible—for his acts. If such delicate machinery is out of gear at all, the whole machine, they say, must also be out of gear. And of this opinion apparently was Lord Brougham, who held in the case of *Waring* v. *Waring*,[1] "that the mind is one and indivisible," and that therefore any degree of mental unsoundness, however slight and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of a testator. Lord Penzance took the same view in *Smith* v. *Tebbitt*.[2] But this is not the law to-day. It was decided in the leading case of *Banks* v. *Goodfellow*,[3] that partial unsoundness, not affecting the general faculties and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render him incapable of disposing of his property by will. Brett, J., at the trial of the action at the assizes, left to the jury the question whether, at the time of making the will, the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in the disposition of his property, and to act upon it; and they were further directed that the mere fact of the testator's being able to recollect things, or to converse rationally on some subjects, or to manage some business, would not be sufficient to show he was sane; while, on the other hand, slowness, feebleness and eccentricities would not be sufficient to show he was insane; and that the whole burden of showing that the testator was fit at the time was on the party claiming under the will. It was held that this direction was substantially correct. It is now, therefore, the law that the mere existence of a delusion in the mind of a person making any disposition of his property is not sufficient to avoid it, even though the delusion is connected with the subject-matter of such disposition, and it will be a question for the jury whether the delusion did in fact affect such disposition.[4] A man, who is capable of transacting business of a complicated and important kind, may yet be subject to delusions so as to be unfit to make a will; nevertheless, if the delusions in question are such that they could not reasonably be supposed to have affected the dispositions made by his will, it will be valid.[5]

The law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding of the contracting parties, and if the party be of sound mind the mere weakness of his mental powers does not incapacitate him. Weakness of understanding may, however, be a material circumstance in establishing an inference of unfair practice or imposition, and it will naturally awaken the attention of a Court of justice to every unfavourable appearance in the case.[6]

[1] (1848), 6 Moo. P. C. at p. 349.
[2] (1867), L. R. 1 P. & D. 398.
[3] (1870), L. R. 5 Q. B. 549; followed in *Smee* v. *Smee* (1879), 5 P. D. 84.
[4] *Jenkins* v. *Morris* (1880), 14 Ch. D. 674.
[5] *Smee* v. *Smee* (1879), 5 P. D. 84.
[6] See the remarks of Lord Cranworth, L. C., in *Boyse* v. *Rossborough* (1857), 6 H. L. Cas. at p. 45.

From very early times the Crown undertook the care and custody of idiots and lunatics and of their estates.[1] From the sixteenth century this jurisdiction has been vested in persons appointed for the purpose.[2] Under the Lunacy Act, 1890,[3] it is now exercised by the Lord Chancellor or one of the judges of the Supreme Court, who is appointed for the purpose by commission under the Sign Manual and is called the Judge in Lunacy.[4] He also acts as an additional judge of the Chancery Division whenever an application in lunacy requires the exercise of the Chancery jurisdiction,[5]—to the exclusion of the judges of that Division, except as to matters relating to a lunatic mortgagee or trustee who is also an infant.[6]

Among the matters which are entrusted to the jurisdiction of the Judge in Lunacy is the making of orders for the custody of a lunatic so found and the management of his estate.[7] He will not make an order as to the custody of the lunatic unless his condition actually requires it.[8] The person who has the custody of the lunatic is called the committee of his person, and the person who has the management of his estate is called the committee of his estate. The jurisdiction of the Judge in Lunacy is not limited to lunatics who have been found by inquisition to be insane. It extends to all persons whom he is satisfied to be of unsound mind, even though they have not been so found nor are detained under a reception order.[9] Appeal from any order made by the Judge in Lunacy lies to the Court of Appeal.[10]

Under the Judge in Lunacy are the Masters in Lunacy, who hold inquisitions and conduct inquiries and perform all other duties assigned to them by the Lunacy Act, 1890, or the rules made under it.[11]

[1] See the statute *De prærogativa regis* (1323), 17 Edw. II., st. 1, cc. 9, 10.

[2] By the Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), s. 2, the Lord Chancellor and the Lords Justices of Appeal in Chancery (now Lords Justices of Appeal). Their jurisdiction was not affected by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 17 (3); but see s. 18 (5).

[3] 53 Vict. c. 5, s. 108.

[4] As a rule the Lords Justices are selected for this purpose.

[5] *In re Platt* (1887), 36 Ch. D. 410; *In re Barber* (1888), 39 Ch. D. 187, 188.

[6] Lunacy Act, 1890 (53 Vict. c. 5), s. 143.

[7] *Ib.*, s. 108 (2), (4).

[8] *Ib.*, s. 108 (3).

[9] *Ib.*, s. 116; Lunacy Act, 1908 (8 Edw. VII., c. 47), s. 1; and see *In re Barber* (1888), 39 Ch. D. 187.

[10] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 18 (5); and see *In re Cathcart*, [1893] 1 Ch. 466; *In re Cathcart*, [1902] W. N. 80.

[11] 53 Vict. c. 5, ss. 111, 112; 8 Edw. VII. c. 47, s. 3.

Commissioners in Lunacy are also appointed to supervise asylums and houses licensed for the reception of lunatics in order to secure the proper treatment of the inmates and the due observance of the law.[1] Lunatics whose affairs are under the control of the Judge in Lunacy are visited by Chancery Visitors,[2] whose duties are very similar. The Act also provides that visitors shall be appointed to supervise every asylum [3] and house licensed for the reception of lunatics. [4]

The chief method of determining whether a person is a lunatic or not is by an inquisition, which may be directed to be had before a jury.[5] This method is, however, somewhat expensive, and when the only object of declaring a person a lunatic is to confine him for his own welfare, the Act provides that, upon the prescribed certificates of medical practitioners that he is a lunatic, a "judicial authority" [6] may grant a "reception order," [7] which will justify his detention in an asylum or house licensed for the reception of lunatics. If the lunatic recovers, he may be discharged if he is detained under a reception order, but if he has been found by inquisition to be a lunatic, then a writ of *supersedeas* is necessary to set aside the inquisition.[8]

The law presumes every person to be sane and accountable for his actions until the contrary is proved. The defence of insanity is often raised both in criminal proceedings and in civil actions, whether of tort or contract. The principles which regulate this defence in criminal charges may now be regarded as settled; in actions of contract, too, the authorities are clear, but in actions of tort the extent to which insanity affects the nature of the act complained of is not yet adequately defined.

Any one who is proved to have committed a criminal act will be found guilty and punished, unless he can show clearly that at the time he did that act he was "labouring under such a defect of reason, from disease of the mind, as not to

[1] 53 Vict. c. 5, ss. 150—162, 187, 191, 192, 194—200.
[2] *Ib.*, ss. 163—168, 183—186.
[3] *Ib.*, ss. 169—176, 194, 195, 196.
[4] *Ib.*, ss. 177—182, 193, 194—197.
[5] *Ib.*, ss. 90—100. In a proper case the Judge in Lunacy may direct that the question be tried as an issue before a judge of the High Court and a jury: ss. 94, 104. A person dissatisfied with the finding of an inquisition can apply for a traverse within three months in order to re-try the question: ss. 101—103.
[6] The "judicial authority" is defined as the county court judge of the district or certain justices of the peace for the county or borough where the lunatic resides: ss. 9, 10. For reception orders by Commissioners in Lunacy, see s. 23. Communications to the judicial authority for the purpose of obtaining a reception order are absolutely privileged: *Hodson* v. *Pare*, [1899] 1 Q. B. 455.
[7] *Ib.*, ss. 4—8. For cases of urgency see s. 11. Lunatics, who are not under proper care or control or who are ill-treated or neglected, are provided for by ss. 13—22.
[8] *Ib.*, ss. 105, 106.

know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong."[1] If he was conscious that the act in question was one which he ought not to do, he is punishable. "It is essential to constitute responsibility for crime that a man shall understand the nature and quality of the thing he is doing, or that he shall be able to distinguish in the act he is doing right from wrong. Now a very small degree of intelligence is sufficient to enable a man to judge of the quality and nature of the act, and whether he is doing right or wrong, when he kills another man; accordingly he is responsible for the crime committed if he possesses that amount of intelligence."[2]

If the accused labours under a partial delusion only, and is not in other respects insane, he will be under the same degree of responsibility as if the facts with respect to which the delusion exists were real. Whenever the prisoner is shown to have acted under some insane delusion as to the surrounding circumstances which concealed from him the true nature of the act which he was doing, the test is this: assuming the facts to have been as they appeared to him to be, do they afford him any defence to the indictment? If not, he must be convicted, because his crime in that case was not the result of his delusion.

Thus "if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he will be exempt from punishment. But if his delusion were that the deceased had inflicted a serious injury on his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."[3]

The law on the subject is thus stated in the answers given by the fourteen judges to the questions put to them by the House of Lords in 1843, after the acquittal of M'Naghten, who had been tried for the murder of Mr. Drummond, the secretary of Sir Robert Peel.[4] Their answer to the first question was as follows :—

A person labouring under such partial delusion only, and not being in

[1] *Per* Tindal, C. J., in *M'Naghten's Case* (1843), 10 Cl. & F. at p. 210.
[2] *Per* Hannen, P., in *Boughton* v. *Knight* (1873), L. R. 3 P. & D. at p. 72.
[3] *Per* Tindal, C. J., in *M'Naghten's Case* (1843), 10 Cl. & F. at p. 211.
[4] Although these answers were given extra-judicially, they have always been regarded as of binding authority.

other respects insane, although he did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some public benefit, is nevertheless punishable according to the nature of the crime committed, "if he knew at the time of committing such crime that he was acting contrary to law," *i.e.*, to the law of the land.

Insanity not only affects the judgment; it sometimes paralyses the will. Hence, if the prisoner can satisfy the jury that he acted under some wholly uncontrollable impulse, he will be entitled to an acquittal; but it is very difficult to establish such a defence. The mere absence of any motive for the crime is no ground for inferring the existence of an insane and irresistible impulse.

Habitual drunkenness, although not in itself affording excuse for crime, may induce insanity, which will render the individual affected by it wholly irresponsible for his acts; and *delirium tremens*, caused by drinking, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility.[1] But in other cases "if a man voluntarily makes himself drunk, that is no excuse for any crime which he may commit whilst in that state; he must take the consequence of his own act, or many crimes would otherwise be unpunished."[2] Nevertheless, the fact that the accused was drunk at the time he committed the crime may be taken into consideration in cases where some special intention in the mind of the accused is a necessary element of the crime charged against him; for a person may be so drunk as to be utterly unable to form any intention at all. Such considerations might arise in cases of murder, or of threatened violence, or of an attempt to commit suicide.[3] It is also of importance where any question arises as to whether the act was wilful or accidental—for instance, whether a house was set on fire designedly or by accident. But if it be proved

[1] *R.* v. *Davis* (1881), 14 Cox, 563.

[2] *Per* Parke, B., in *R.* v. *Thomas* (1837), 7 C. & P. at p. 820.

[3] See the judgments of Parke, B., in *R.* v. *Thomas* (1837), 7 C. & P. at pp. 818—820; and of Darling, J., in *R.* v. *Meade*, [1909] 1 K. B. at pp. 897—900; and *ante*, pp. 122, 268. See also *R.* v. *Moore* (1852), 3 C. & K. 319; *R.* v. *Doody* (1854), 6 Cox, 463; but there are contrary rulings in *R.* v. *Carroll* (1835), 7 C. & P. 145; *R.* v. *Meakin* (1836), *ib.*, 297.

that the accused had previously formed an intention to commit the crime, the mere fact that he was drunk at the time when he did commit it would furnish no excuse.

It is for the accused to make out clearly that he was insane at the time of committing the offence charged against him; the *onus* of doing so rests on him. If, however, the jury are satisfied that at the time in question the accused was insane, they must return a special verdict that he was guilty of the act but was insane at the time; and the judge will then order him to be kept in custody as a criminal lunatic in such place and in such manner as the Court shall direct till His Majesty's pleasure shall be known.[1] It sometimes happens that, upon arraignment, the accused appears manifestly to be insane; when this is so, he will not be allowed to plead; the question as to his sanity will have to be tried by a jury returned *instanter* for that purpose, and, if he be found to be insane, the judge will order him to be detained during His Majesty's pleasure.[2]

A person who is admittedly a lunatic can both sue and be sued in civil actions, whether of tort or contract.[3] If he has not been found a lunatic by inquisition, he must sue by his next friend; if he has been so found, then by his committee,[4] who before commencing proceedings must obtain the sanction of the Master and Judge in Lunacy.[5] A lunatic defends an action by his committee if one has been appointed, unless the interests of the lunatic and committee be adverse; in other cases a guardian *ad litem* must be appointed.

A lunatic can bring an action for any tort committed against him, but it is not yet settled to what extent he is liable for torts committed by him. In such cases as trespass, where the intention of the offender is quite immaterial, it is obvious that a lunatic cannot escape liability. It has been said, too, that a lunatic is liable for any defamatory words he may have published;[6] but in America insanity has been held to be a defence where the derangement is so great

[1] 46 & 47 Vict. c. 38, s. 2 (1), (2); and see 47 & 48 Vict. c. 64, ss. 5, 16.

[2] 39 & 40 Geo. III. c. 94, s. 2. See *R.* v. *Pritchard* (1836), 7 C. & P. 303; *R.* v. *Goode* (1837), 7 A. & E. 536. A person who is deaf and dumb and unable to communicate with anybody at all is a lunatic for this purpose: *R.* v. *Stafford Prison* (*Governor*), [1909] 2 K. B. 81. The cost of maintenance in such a prison is a Crown debt and recoverable accordingly: *In re J.*, [1909] 1 Ch. 574.

[3] Order XVI., r. 17.

[4] *Lord Townshend* v. *Robins*, [1908] 1 Ch. 201; *In re Hunt*, [1906] 2 Ch. 295.

[5] Lunacy Act, 1891 (54 & 55 Vict. c. 65), s. 27 (1); *In re Hinchliffe* (1895), 73 L. T. 522.

[6] See the remarks of Kelly, C. B., in *Mordaunt* v. *Mordaunt* (1870), 39 L. J. P. & M. at p. 59.

and notorious that the lunatic's words would produce no effect on the hearers.[1] In cases where the intention must go with the act, the liability of a lunatic to pay damages would probably be held to be governed by principles similar to those which are applied in criminal cases. Lunacy would, however, be a strong ground to be urged in mitigation of damages.

As in the case of infants,[2] contracts for the supply of necessaries to a lunatic or to his wife and family[3] during his lunacy differ from other contracts. He is liable to pay a reasonable price for such necessaries, whether or not the person who supplied them knew at the time they were ordered that he was a lunatic.[4] The authority of a wife to bind her husband for necessaries is the same whether he be a lunatic or sane.[5] Moreover, "if a person finds necessaries for a lunatic, and intends to be repaid for so doing and to constitute a debt against the lunatic, I do not doubt that the law implies an obligation on the part of the lunatic's estate to repay the amount spent on such necessaries."[6] To be necessaries the goods must be suitable to the condition in life of the lunatic and to his actual requirements at the time of the sale and delivery.[7]

As to all contracts other than those for the supply of necessaries, the rule is now that "when a person enters into a contract and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, whether it is executory or executed, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be

[1] *Dickinson* v. *Barber* (1812), 9 Tyng (Mass.), 215, 218; *Yeates* v. *Reed* (1838), 4 Blackford (Ind.), 463; *Gates* v. *Meredith* (1856), 7 Porter (Ind.), 440.

[2] See *ante*, pp. 1361—1363.

[3] *Read* v. *Legard* (1851), 6 Exch. 636; and see *Richardson* v. *Du Bois* (1870), L. R. 5 Q. B. 51.

[4] Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 2; *In re Rhodes* (1890), 44 Ch. D. 94; *Brockwell* v. *Bullock* (1889), 22 Q. B. D. 567. The costs connected with a lunacy commission may be necessaries: *Wentworth* v. *Tubb* (1841), 1 Y. & C. (Ch.) 171.

[5] *Richardson* v. *Du Bois*, *supra*.

[6] *Per* Lopes, L. J., in *In re Rhodes* (1890), 44 Ch. D. at p. 108; and see the judgment of Lindley, L. J., *ib.*, at p. 107.

[7] 56 & 57 Vict. c. 71, s. 2.

so insane as not to be capable of understanding what he was about." [1]

We have here an exception to the rule that there cannot be a contract unless the minds of both the contracting parties are agreed on the same thing; for in the case of lunacy or excessive drunkenness the mind of one party is incapable of forming an agreement, and yet the contract is enforceable, unless it can be shown that the plaintiff knew that the defendant was insane when he entered into the contract. It is not enough for the lunatic or his representative to prove that he was in fact insane at the date of the contract.

Thus, in *Molton* v. *Camroux* [2] a lunatic purchased of a life assurance company certain annuities, and paid the consideration money and a premium in respect thereof. After his death an action was brought for recovery of these moneys by his administratrix. The jury found by a special verdict that at the time of the granting of the annuities and payment of the consideration money the intestate was a lunatic and of unsound mind, so as to be incompetent to manage his affairs, but of this the company had not, at that time, any knowledge, and that the transaction took place in the ordinary course of business, and was fair and *bonâ fide*, as the grantee appeared to the company to be of sound mind, and the company fully intended to pay the annuities. It was held that the contract could not be set aside either by the lunatic or by anyone claiming under him.

An action will lie to recover money paid under a contract made by a lunatic, if at the time of the transaction the fact of the plaintiff's insanity was known to the defendant; and in such an action evidence will be admissible of the plaintiff's conduct upon various occasions, both before and after the transaction, to show that his malady was such as would make itself apparent to the defendant when the parties were dealing together.[3]

It has been said that "all acts done during a lucid interval are to be considered done by a person perfectly capable of contracting, managing, and disposing of his affairs at that period," and that therefore a deed executed by a lunatic during a lucid interval will bind him.[4] But it is now decided, that a person once found lunatic by inquisition cannot, while the inquisition continues in force, execute a deed dealing with his property, even in a lucid interval. Such a deed will be treated as void.[5]

A contract made during sanity is not avoided by subsequent insanity, unless it thereby becomes impossible of performance.[6]

[1] *Per* Lord Esher, M. R., in *The Imperial Loan Company* v. *Stone*, [1892] 1 Q. B. at p. 601.

[2] (1848), 4 Exch. 17. See also *Price* v. *Berrington* (1851), 3 Mac. & G. at p. 498; and *Foxwell* v. *Van Grutten* (1896), 13 Times L. R. at p. 309.

[3] *Beavan* v. *M'Donnell* (1854), 10 Exch. 184.

[4] *Per* Sir W. Grant, M. R., in *Hall* v. *Warren* (1804), 9 Ves. at p. 610. See *Beverley's Case* (1603), 4 Rep. 125 a.

[5] *In re Walker*, [1905] 1 Ch. 160. He can apparently make a valid will: see *ante*, p. 1370.

[6] *Hall* v. *Warren*, *suprà*. As to contracts of marriage, see *Durham* v. *Durham* (1885), 10 P. D. 80.

It must now be taken as settled law that the lunacy of the principal determines the authority of his agent.[1] Hence, where an authority given to an agent has, without his knowledge, been determined by the death or lunacy of the principal, and subsequently the agent has, in the belief that he was acting in pursuance thereof, made a contract or transacted some business with another person, representing that, in so doing, he was acting on behalf of the principal, the agent is liable, as having impliedly warranted the existence of the authority which he assumed to exercise.

Thus, in *Yonge* v. *Toynbee*,[2] a firm of solicitors were instructed by a client to conduct his defence to an action which was then threatened and was afterwards commenced against him. Before the commencement of the action the client became, and was certified as being, of unsound mind. In ignorance of his unsoundness of mind, and of his having been so certified, the solicitors entered an appearance for him in the action, and delivered a defence, and other interlocutory proceedings took place in the action. But before the trial, the plaintiff's solicitor was informed that the defendant had been certified as being of unsound mind. The Court thereupon ordered that the appearance and all subsequent proceedings in the action should be struck out, and that the solicitors who had assumed to act for the defendant should be ordered personally to pay the plaintiff's costs of the action up to date, on the ground that they had so acted without authority, and had thereby impliedly warranted that they had authority.

But where a committee is authorised by the Judge in Lunacy to carry on a lunatic's business, he is thereby constituted the agent of the lunatic and consequently cannot be made personally liable on any contract into which he may enter in carrying out the order of the Court.[3]

The effect of drunkenness upon capacity to contract is now in law much the same as the effect of lunacy. A person who has contracted, even by deed,[4] whilst so intoxicated as to be deprived of his reason and therefore not to know the consequences of his act, may successfully dispute his liability in respect of such transaction, particularly if the other contracting party was aware of his condition.[5]

[1] *Drew* v. *Nunn* (1879), 4 Q. B. D. 661. The lunacy of a husband, however, does not determine the authority of his wife to pledge his credit for necessaries: *Read* v. *Legard* (1851), 6 Exch. 636.

[2] [1910] 1 K. B. 215.

[3] *Plumpton* v. *Burkinshaw*, [1908] 2 K. B. 572.

[4] *Per* Sir W. Grant, M. R., in *Cooke* v. *Clayworth* (1811), 18 Ves. 15, 16.

[5] *Gore* v. *Gibson* (1845), 13 M. & W. 623, which "was no doubt rightly decided, but some of the *dicta* of the judges cannot be supported in all their fulness since the decision in *Molton* v. *Camroux*" (*ante*, p. 1377): *per* Pollock, B., in *Matthews* v. *Baxter* (1873), L. R. 8 Ex. at p. 134.

The contract of a man too drunk to know what he is about is voidable only, not void, and is therefore capable of being ratified by him when he becomes sober,[1] and if so ratified will bind him to perform it. A tradesman who supplies a drunken man with goods may recover the price of them, if the party keeps them when he becomes sober, and by section 2 of the Sale of Goods Act, 1893, a drunken man must pay a reasonable price for necessaries.

A state of partial intoxication merely—less in degree than that indicated above—would seem, in the absence of fraud and unfair dealing, to afford no defence to an action founded upon contract, though the fact that a man took an obligation from one whom he knew to be drunk is always some evidence of fraud.

[1] *Matthews* v. *Baxter*, *suprà*.

## Chapter IV.

### EXECUTORS AND ADMINISTRATORS.

Death determines all criminal responsibility;[1] it puts an end to liability for most torts; it leaves unaffected, as a rule, the contractual obligations incurred by the deceased.

Under some systems of law the personality of the deceased continues after his death, and is regarded as a separate legal entity. *Hæreditas defuncti personam sustinet.* This is not yet so in England, although our law has for the last hundred years or more been gradually approaching a somewhat similar position. We do not adopt the fiction by which a dead man's estate is regarded as a legal *persona*. But when any question arises as to the disposal of his property, real or personal, our Courts insist upon the presence of a "legal representative" of the deceased.[2]

The duties of such representative are very various. In the first place, he must bury the deceased;[3] next he must pay the funeral and testamentary expenses, then realise the estate, and pay the debts of the deceased so far as the proceeds permit. Lastly the surplus, if any, he must divide according to the directions of the will if there be one, or if not, according to the rules of intestate succession. The succession to personal property upon its owner's death is governed by the law of the country in which he was then domiciled; but succession to land is governed by the law of the country where it is situated.[4]

The personal representative of the deceased may be either an executor or an administrator. The person named in a will

[1] Suicide is theoretically felony; an attempt to commit suicide is, as we have seen (*ante*, pp. 301, 311, note 3), a misdemeanour.

[2] See Order XVII., rr. 2, 4.

[3] If any one else buries the deceased, he can recover the reasonable expenses of the funeral: *Ambrose* v. *Kerrison* (1851), 10 C. B. 776; and see *ante*, pp. 15 and 1355.

[4] But see 24 & 25 Vict. c. 114.

as the executor becomes entitled, from the moment of the death of the testator, to all his personal property, which, after payment of the debts of the deceased, he is bound to apply according to the directions of the will. And now by the Land Transfer Act, 1897,[1] a testator's real estate also vests in his executor on his death, and will not pass to his heir or devisee without the assent of the executor.[2] If, as is usual, two or more persons be named as executors, any one of them who is of full age may, as a rule, perform any of the ordinary acts of administration without the concurrence of the others. Nevertheless, in any legal proceeding concerning the estate of a deceased person all executors who have proved the will must be joined as parties;[3] it is not necessary to add any of the persons beneficially interested in the estate.[4] Nor is it necessary to make the representative of a deceased executor a party to an action, if there be any executor surviving.[5]

If, however, a person dies intestate, it is necessary to apply to the Probate Division of the High Court of Justice to appoint someone to administer his effects.[6] Such person is called an administrator, and is usually the wife, child, or a creditor of the deceased. He has when appointed the same right to, and power over, all the estate of the intestate as the latter's executors would have had if he had made a will, and this right and power relate back to the date of the decease of the intestate as soon as the administrator is duly appointed.

The Court can grant administration for a limited time or purpose.[7] If the sole executor named in a will be under age, or if the next of kin of an intestate entitled to letters of administration be under age, the Court will grant letters of administration to someone else till he attains the age of twenty-one years; this is called administration *durante minore ætate*. So if the executor or next of kin should be out of the realm at the time of the decease of the testator or intestate and there is no prospect of his speedy return, the Court will grant a limited administration *durante absentiâ*, which will expire immediately on the return of such executor or next of kin.

[1] 60 & 61 Vict. c. 65, ss. 1—3.
[2] See *ante*, p. 1248.
[3] See *Latch* v. *Latch* (1875), L. R. 10 Ch. 464.
[4] Order XVI., r. 8.
[5] *In re Harrison, Smith* v. *Allen*, [1891] 2 Ch. 349; and see *In re Bowden, Andrew* v. *Cooper* (1890), 45 Ch. D. 444; *Whiting* v. *De Rutzen*, [1905] 1 Ch. 96.
[6] See, however, 36 & 37 Vict. c. 52; 38 & 39 Vict. c. 27.
[7] See 20 & 21 Vict. c. 77, s. 73.

And if the executor should prove the will, or if any person should obtain letters of administration, and afterwards go to reside out of the jurisdiction of the English Courts, the Court can grant administration to another at the end of the year from the death of the testator or intestate.[1] Again, when a suit concerning the right of administration is pending in the Probate Division of the High Court, the Court may appoint an administrator *pendente lite*, who will have all the rights and powers of an ordinary administrator, except the right of distributing the residue of the personal estate;[2] and the administrator so appointed may receive such reasonable remuneration for his trouble as the Court may think fit.[3] So if the executor named in a will renounces probate, or dies before the testator, the Court will appoint the person having the greatest interest in the effects, generally the residuary legatee, to administer the estate according to the directions of the will; such an administration is termed an administration *cum testamento annexo*.[4]

If any person who has not been appointed either an executor or an administrator intermeddles with the goods of the testator, or does any other act relating to the office of executor, he thereby becomes an executor of his own wrong, or, as it is called, an executor *de son tort*. Such a person is liable to the same demands from the creditors of the deceased as if he had been regularly appointed an executor—but only to the amount of the assets of the testator which have come to his hands.

As a general rule, all the property of a deceased person passes to his executor at the moment of his death, to his administrator as soon as that officer is duly appointed. And among such property will be included *primâ facie* all his choses in action and all his contractual obligations, but not as a rule any obligation arising out of a tort. With respect to nearly every action of tort the maxim *actio personalis moritur cum personâ* applies, and this is so whether the action is brought in the Chancery or King's Bench Division.[5] Thus, if a person be assaulted or libelled during his life, no action for such a wrong can be commenced after his death.

There are, however, the following exceptions. We will deal first with the cases in which the deceased person, if still alive, would have been plaintiff.

(i.) By 4 Edw. III. c. 7, an executor can sue for damage done to the

[1] 38 Geo. III. c. 87, ss. 1—5, extended by 20 & 21 Vict. c. 77, s. 74; 21 & 22 Vict. c. 95, s. 18.

[2] 20 & 21 Vict. c. 77, s. 70; see 36 & 37 Vict. c. 66, s. 16; *In re Toleman*, [1897] 1 Ch. 866.

[3] 20 & 21 Vict. c. 77, s. 72.

[4] 1 Williams' Executors, 10th ed., 370.

[5] *Peek* v. *Gurney* (1873), L. R. 6 H. L. 377.

testator's personal estate, and by a later statute the executor of an executor can do so.[1] Thus, whenever a tort has been committed which has depreciated the value of any personal property of the deceased, his executor can sue for and recover the amount of such depreciation, but not, it is submitted, any collateral damages for any personal affront or injury done to the deceased apart from the damage to his property.[2]

(ii.) By the Civil Procedure Act, 1833,[3] an executor can sue for a wrong done to the testator's realty, provided the damage was done within six months before, and the action brought within one year after, the death.

(iii.) By Lord Campbell's Fatal Accidents Act, 1846,[4] when a person dies by an act or neglect of another, which, if he had not died, would entitle him to sue the latter, his personal representatives may within twelve months bring an action for damages caused by such death to the parent, child, wife or husband of the deceased, for their benefit.

(iv.) By the Employers' Liability Act, 1880,[5] where under that Act an employee himself could have claimed if the injury had not caused death, his executor can claim in his stead. Notice of the accident must be given within six weeks, and the action brought within twelve months after the death.

(v.) Under the Workmen's Compensation Act, 1906,[6] the "dependants" of a workman who has been killed by an accident arising out of and in the course of his employment may also claim compensation. The word "dependants" is defined in the Act as including "such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent, and where the workman, being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings, or, being an illegitimate child, leaves a parent or grandparent so dependent upon his earnings, shall include such an illegitimate child and parent or grandparent respectively."

These last three cases are not so much exceptions to the rule as instances of rights which are given by statute by reason of the death of the individual in question.

Next, we will deal with those cases in which, if still alive, the deceased would have been defendant.

(i.) Whenever property or the proceeds of property belonging to another have been appropriated by the deceased wrongdoer, and added to his own estate or moneys, an action lies against the executor of the wrongdoer; but this rule is limited to the recovery of specific acquisitions, or their value, and can only be maintained if there is some beneficial property or value capable of being measured, followed, and recovered. Thus, an action will lie against the executor in respect of ore wrongfully dug or timber

[1] 25 Edw. III. st. 5, c. 5.
[2] *Hatchard* v. *Mège* (1887), 18 Q. B. D. 771.
[3] 3 & 4 Will. IV. c. 42, s. 2.
[4] 9 & 10 Vict. c. 93, s. 2.
[5] 43 & 44 Vict. c. 42, s. 1.
[6] 6 Edw. VII. c. 58, s. 13.

wrongfully felled by the testator, but not for an assault, or for ploughing up meadows.[1]

(ii.) By 3 & 4 Will. IV. c. 42, s. 2, an action may be brought against the executors or administrators of the deceased for any wrong done by him in respect of real or personal property[2] of the plaintiff, provided—

(a) the injury was committed within six calendar months of the wrongdoer's death; and

(b) the action is brought within six months of the appointment of executors or administrators.

We proceed to discuss the effect of death upon the contracts of the deceased. A contract is not necessarily determined, nor is a vested right of action for breach of contract abated, by the death of either party. The personal representative of that party, though not named or referred to in the contract, can sue or be sued on all breaches of contract committed in the lifetime of the deceased. He can also sue or be sued on all contracts which are broken after the death, unless the skill or taste of the deceased was required for the performance of the contract, or unless it was expressly stipulated that it should be performed by the deceased himself, or unless the contract was expressly limited to his lifetime. In all other cases the contract survives; and the executor will be liable for the non-performance of anything which his testator had contracted to do. For such breaches of contract, however, he can only be sued as executor, and he is liable only to the extent of the assets which have come into his hands, though the plaintiff can obtain a judgment binding future assets as soon as they come into the hands of the executors.[3]

But in addition to this, which may be described as the derivative liability of an executor, he may also make himself personally liable on the contracts of his testator, or in the course of administration he may, necessarily or unnecessarily, enter into contracts to which the testator was never a party.

[1] *Bishop of Winchester* v. *Knight* (1717), 1 P. Wms. 406; *Phillips* v. *Homfray* (1883), 24 Ch. D. 439; *Peck* v. *Gurney* (1873), L. R. 6 H. L. 377; *In re Duncan, Terry* v. *Sweeting*, [1899] 1 Ch. 387.

[2] These words include the obstruction of ancient lights: *Jenks* v. *Clifden*, [1897] 1 Ch. 694.

[3] This is therefore called a judgment *quando acciderint*.

On such contracts the executor is liable to the full extent, but, if he has acted honestly, the Court will usually permit him to recoup himself out of the estate. Either an executor or an administrator may compromise any claims made on behalf of or against the estate of the deceased.[1]

If a party contract for himself and his executors to build a house, and die before it is completed, the executors must proceed with the work; else they will be held responsible *quâ* executors for breach of contract. If they thus proceed, the work and labour will be done by them as executors, they may recover for it as executors, and the remuneration thus recovered will be assets in their hands.[2] But executors and administrators cannot sue or be sued on executory contracts which are strictly personal to the deceased.[3] Thus, an action for breach of promise of marriage will not survive against the personal representative unless there has been special damage, which must be to the property, not to the person, of the promisee, and which must have been in the contemplation of both parties at the time of making the promise. Even then, the action will be only for the special, not for the general, damage.[4] Conversely, no action can be brought by the personal representative of the promisee.[5]

Again, it would seem that "all contracts for personal services which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall be alive to perform them; and should he die, his executor is not liable to an action for the breach of contract occasioned by his death."[6]

If, however, money be lent to or received by an executor or administrator, or if work and labour be performed at his request, or goods be sold and delivered to him, he will be held to have contracted in his individual character and will be personally liable. So if an executor request a creditor to forbear suing him in respect of a debt due from the testator, and promise to pay interest thereon, such promise will be evidence of a personal contract between the executor and that creditor. To make him liable for interest as executor, there must be evidence of a promise by the testator to pay interest so long as the debt should be forborne.[7] It will be remembered that, before an executor or administrator can be sued "upon any special promise to answer damages out of his own estate," there must by section 4 of the Statute of Frauds be an agreement in writing signed by the party to be charged.[8] An executor has no authority to carry on the business of the deceased.

[1] 22 & 23 Vict. c. 35, ss. 27—29; 56 & 57 Vict. c. 53, s. 21.
[2] *Marshall* v. *Broadhurst* (1831), 1 Cr. & J. 403, 405; *Crosthwaite* v. *Gardner* (1852), 18 Q. B. 640.
[3] *Pulling* v. *G. E. Ry. Co.* (1882), 9 Q. B. D. 110; *Phillips* v. *Homfray* (1883), 24 Ch. D. 439.
[4] *Finlay* v. *Chirney* (1888), 20 Q. B. D. 494.
[5] *Chamberlain* v. *Williamson* (1814), 2 Maule & S. 408.
[6] *Per* Pollock, C. B., in *Hall* v. *Wright* (1858), E. B. & E. at pp. 793, 794.
[7] *Bignell* v. *Harpur* (1850), 4 Exch. 773, 775.
[8] See *ante*, pp. 689—692.

Therefore, unless protected therein by the Court, he would be personally liable for debts contracted since the testator's death, if assets failed.[1] If, however, he carries on the business with the consent of the creditors, he is entitled to be indemnified in priority to them for his proper expenses.[2] A claim by or against an executor or administrator as such cannot be joined with any claim by or against him personally, unless the latter claim is alleged to arise with reference to the estate of which he is executor or administrator.[3]

By section 59 of the Conveyancing Act, 1881, any covenant, bond or obligation under seal made after December 31st, 1881, "though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed." The creditor is not bound, however, to sue both the real and personal representatives of the deceased obligor; he may proceed against either or both. But if he elect to proceed against the real estate, and his deceased debtor by his will devised it away, then he must sue both the personal representative and the devisee (or, if necessary, the devisee of such devisee) in one action.[4]

An executor cannot maintain an action for a debt which accrued to his testator, and for which he might have sued more than six years before the issuing of the writ.[5] But, under the equity of the statute, where an action has been commenced within the period of limitation and the defendant dies, the plaintiff can bring a new action against the executor or administrator within a reasonable time, although the time limited by the statute may have elapsed.[6]

Lastly, we will briefly state how pending legal proceedings are affected by the death of one of the parties.

In criminal cases, on the death of the accused, the proceedings drop, and no order as to costs can be made either against him or against the prosecutor. The death of the prosecutor, on the other hand, does not affect the proceedings. The rule is the same in *quasi*-criminal matters. For example, the liability of the putative father under a bastardy order is purely personal; and if the father dies, the mother has no right to claim against his estate either arrears or future payments.[7]

[1] *In re Johnson* (1880), 15 Ch. D. 548.
[2] *Dowse* v. *Gorton*, [1891] A. C. 190.
[3] Order XVIII., r. 5.
[4] 11 Geo. IV. & 1 Will. IV. c. 47, ss. 2—4; 60 & 61 Vict. c. 65, ss. 1—3.
[5] 21 Jac. I. c. 16, s. 3; *Penny* v. *Brice* (1865), 18 C. B. N. S. 393.
[6] *Swindell* v. *Bulkeley* (1886), 18 Q. B. D. 250.
[7] *In re Harrington*, [1908] 2 Ch. 687.

In civil proceedings, on the other hand, the death of either the plaintiff or defendant does not cause the action to abate, if the right of action survives.[1] This is so, whether the action be of contract or of tort. If, however—as is the case in most actions of tort—the cause of action does not survive the death of either party, it depends upon the stage which the action has reached at the time of the death whether the proceedings can be continued by or against the executor or administrator. If either party dies before verdict, the action abates and each party must bear his own costs. There will, however, be "no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death."[2] If interlocutory judgment be signed and a writ of inquiry issue, and then plaintiff die, final judgment cannot be entered.[3] If, however, verdict and final judgment has once been entered in the plaintiff's favour, and then plaintiff dies and defendant appeals, the action will not abate; but the executors or administrators of the late plaintiff may appear as respondents to the appeal and sustain the judgment.[4] So, if either party die after final judgment, execution can issue under Order XLII., r. 23.

[1] Order XVII., r. 1.
[2] Order XVII., r. 1; *Palmer* v. *Cohen* (1831), 2 B. & Ad. 966. See, however, *Brydges* v. *Brydges and Wood*, [1909] P. 187; *M.* v. *M.* (1910), 26 Times L. R. 305.
[3] 8 & 9 Will. III. c. 11, s. 6; *Ireland* v. *Champneys* (1813), 4 Taunt. 884; and see *Bowker* v. *Evans* (1885), 15 Q. B. D. 565.
[4] *Twycross* v. *Grant and others* (1878), 4 C. P. D. 40.

## Chapter V.

### BANKRUPTS.

The institution of bankruptcy was formerly part of the law merchant of Europe. It apparently originated in Italy, and was speedily adopted in France. Its introduction into England dates from the reign of Henry VIII. The first statute on the subject was passed in 1543.[1] Originally bankruptcy was treated as a crime; even now "what the petitioner seeks by his petition is in the highest degree penal in its consequences. It amounts to loss of civil status, carrying with it grave disqualifications."[2]

The object of the law of bankruptcy is two-fold:—

(a) Firstly, to secure the equitable division of the debtor's assets among his creditors—in other words, to protect the creditors from one another.

(b) Secondly, to protect a debtor who honourably assists in such division from future claims, so that he may start life anew, freed from antecedent liability.

But the Legislature has made careful provision to secure that the discharge of a debtor from his liabilities should not be sought or used fraudulently, that no secret arrangements should be made by the debtor with a single creditor to the prejudice of the others, and that secured creditors should not be deprived of the full benefit of their securities.

It is impossible in this work to deal in more than the barest outline with our present law of bankruptcy. Nearly the whole of it will be found codified in the Acts of 1883 and 1890,[3] which repealed all previous Acts. There are, however, still in force certain rules of practice and administration which are not contained in those statutes.

[1] 34 & 35 Hen. VIII. c. 4.
[2] *Per* Moulton, L. J., in *In re A Debtor*, [1910] 2 K. B. at p. 66.
[3] 46 & 47 Vict. c. 52; 53 & 54 Vict. c. 71.

The Courts which now have jurisdiction in bankruptcy are the King's Bench Division of the High Court of Justice[1] and the provincial county courts.[2] They have power to adjudicate a debtor bankrupt, to distribute his estate among his creditors and then to discharge him from all future liability for the debts due to such creditors. Speaking generally, any man or woman, who is within the jurisdiction of any one of these Courts, can be made a bankrupt if he or she owes a personal debt of £50 or more which can be recovered in a Court of law, and which he or she cannot, or will not, pay. So far as liability to be made bankrupt is concerned there is no longer, except in the case of married women,[3] any distinction between traders and non-traders, although certain incidents of bankruptcy law still apply only to persons who carry on a trade or business.[4]

Every married woman who carries on a trade separately from her husband is subject to the bankruptcy laws, in respect of her separate property, in the same way as if she were unmarried.[5] She must be an independent trader,[6] not accountable for the profits of her trade to her husband,[7] and the trade must be her separate property, and not under her husband's control.[8] The mere fact that she possesses separate property,[9] or that the interest which she possesses in a trade is her separate property, is not sufficient.[10] But a married woman is not protected from bankruptcy because she is carrying on a trade in the dwelling-house of herself and her husband and with his assistance.[11] She can be made a bankrupt in respect of her separate trading, although she has sold her business, so long as any of her trade liabilities remain undischarged.[12]

An infant cannot be made a bankrupt, unless possibly for debts incurred for necessaries.[13] He cannot present a petition against himself.[14] "There is nothing illegal or improper in an infant's carrying on a trade."

[1] See *ante*, pp. 1002—1004.
[2] See *ante*, p. 1024.
[3] Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1 (5).
[4] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 4, 6 (1), and 103.
[5] *In re Clark*, [1898] 1 Q. B. 20.
[6] 45 & 46 Vict. c. 75, s. 1 (5); 46 & 47 Vict. c. 52, s. 152.
[7] See *In re Bond* (1888), 21 Q. B. D. 17.
[8] *In re Edwards, Ex parte Harvey* (1895), 2 Man. 182.
[9] *In re Helsby* (1893), 1 Man. 12. She need not in fact possess separate property: *In re Simon*, [1909] 1 K. B. 201.
[10] *Ex parte Coulson* (1887), 20 Q. B. D. 249.
[11] *In re Worsley*, [1901] 1 K. B. 309; *In re Simon*, *suprà*.
[12] *In re Dagnall*, [1896] 2 Q. B. 407.
[13] *In re Soltykoff*, [1891] 1 Q. B. 413: and see *R.* v. *Wilson* (1879), 5 Q. B. D. 28, *ante*, p. 1360.
[14] *Ex parte Jones, In re Jones* (1881), 18 Ch. D. 109.

He cannot be made bankrupt on the petition of persons who have supplied him with goods on credit for trade purposes.[1] Where, however, an infant falsely represented himself to be of full age, and became bankrupt on attaining full age, it was held that the creditor might prove his debt in the bankruptcy.[2] If an action is brought against a firm, one member of which is an infant, for goods supplied to the firm, judgment cannot be recovered against the firm simply; nor can a receiving order be made against the firm simply. Both a judgment and a receiving order must be made against the members of the firm "other than the infant partner." If a receiving order has been made without such limitation, it may be amended under section 105 of the Bankruptcy Act, 1883.[3] A lunatic, on the other hand, can be made a bankrupt.[4]

To render a foreigner liable to bankruptcy he must either have committed an act of bankruptcy in England or become liable in England to be committed to prison for not paying a debt due on a judgment recovered against him and enforceable in England. Therefore, although possessing a place of business and contracting debts in England, a foreigner cannot be made bankrupt either while residing abroad or upon an act committed abroad which, if committed in England, would be an act of bankruptcy.[5] Hence, leave will not be given to serve a bankruptcy notice outside the jurisdiction upon a judgment debtor who is a foreigner resident abroad,[6] though such a notice may be served if the debtor comes temporarily within the jurisdiction.[7]

The first step in any bankruptcy proceeding is to present a bankruptcy petition against the debtor. This may be done by the debtor himself or by a creditor or creditors, the amount of whose debts is at least £50. The petition must be based upon an act of bankruptcy which has been committed within three months before its presentation.[8] It must be presented in the King's Bench Division of the High Court, if the debtor has been resident in the London Bankruptcy Division, or is resident abroad, or cannot be found. In any other case it must be presented in the county court of the district where the debtor has resided or

[1] *Ex parte Jones, In re Jones* (1881), 18 Ch. D. 109.

[2] *Ex parte Unity Banking Association* (1858), 3 De G. & J. 63. At common law it was otherwise: see *Bartlett* v. *Wells* (1862), 1 B. & S. 836.

[3] *Lovell and Christmas* v. *Beauchamp*, [1894] A. C. 607. The Court of Appeal had simply set aside the order, see [1894] 1 Q. B. 1.

[4] *In re Farnham*, [1895] 2 Ch. 799.

[5] As, for instance, on a question of "reputed ownership." See 46 & 47 Vict. c. 52, s. 44 (iii.), *post*, p. 1394.

[6] S. 103; *In re Clark*, [1898] 1 Q. B. 20; *Cooke* v. *C. A. Vogeler Co.*, [1901] A. C. 102; see also *Ex parte Crispin* (1873), L. R. 8 Ch. 374; *Ex parte Blain* (1879), 12 Ch. D. 522.

[7] *In re Pearson*, [1892] 2 Q. B. 263.

[8] The bankruptcy commences at the actual time of day when the act of bankruptcy is committed: s. 43; *In re Bumpus, Ex parte White*, [1908] 2 K. B. 330.

carried on business for the last six months or for the longest period out of the last six months.

A debtor may commit an "act of bankruptcy" in eight different ways[1]:—

(i.) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally.

(ii.) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or of any part thereof.

(iii.) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon which would under any Bankruptcy Act be void as a fraudulent preference if he were adjudged bankrupt.

(iv.) If with intent to defeat or delay his creditors he departs out of England or being out of England remains out of England, or departs from his dwelling-house or otherwise absents himself or begins to "keep house."

(v.) If execution against him has been levied by seizure of his goods under process in an action in any Court or in any civil proceeding in the High Court and the goods have either been sold or held by the sheriff for twenty-one days.[2]

(vi.) If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself.

(vii.) If a creditor obtains final judgment against him for any amount and, execution not having been stayed, serves upon him a "bankruptcy notice," *i.e.*, a notice requiring him to pay the judgment debt or to secure or compound for it, and within seven days after service[3] he neither complies with the notice nor satisfies the Court that he has a counterclaim or set-off, equal to or exceeding the amount of the judgment debt, which could not have been set up in the action.

(viii.) If he gives notice to any of his creditors that he has suspended or is about to suspend payment of his debts.

Unless the debtor successfully disputes (i.) the act of bankruptcy upon which the petition is based, or (ii.) the debt,[4] or (iii.) the jurisdiction of the Court, a receiving order will be made upon the hearing of the petition; otherwise, the petition will be dismissed.

The receiving order does not make the debtor a bankrupt,

[1] S. 4.

[2] If interpleader proceedings are taken, the time occupied in disposing of the questions raised in them is not included: s. 1.

[3] If service is effected abroad, the Court may fix any other period for complying with the notice.

[4] Proceedings are stayed until the debt is established: s. 7 (5); *In re Gentry*, [1910] 1 K. B. 825.

and, indeed, it is not necessarily followed by an order of the Court adjudging the debtor to be bankrupt. But as soon as a receiving order is made by the registrar, the duties of the official receiver commence.[1] He becomes at once *interim* receiver of the bankrupt's property. It is his duty at once to call upon the debtor to prepare a "statement of affairs," which is submitted to the creditors. The official receiver tests the accuracy of this statement and investigates all other matters that come to his knowledge affecting the estate; he conducts the public examination of the debtor before the registrar. He then calls a meeting of the creditors, at which a resolution may be carried to the effect that the debtor be adjudicated a bankrupt.

An adjudication order must be made, if the creditors at their meeting pass such a resolution, or if they pass no resolution at all, or if they do not meet.[2] The order may be made, if the debtor fails to prepare a statement of affairs within seven days from the receiving order or such further time as may be allowed, or generally whenever in the opinion of the Court it ought to be made.[3] A decree of a competent Court declaring a debtor to be bankrupt is a judgment *in rem* affecting his status; it will be recognised and accepted by all Courts in England and Wales and the colonies.

At a meeting of the creditors, it often happens that some composition or scheme of arrangement is proposed by the debtor or his friends. If such a scheme be carried at the meeting, it must be submitted to the Court,[4] or if accepted, the debtor will not be made a bankrupt, or if an adjudication order has been made, it will be annulled.[5] If, however, the scheme, though accepted by the creditors, be subsequently rejected by the Court, an adjudication order must be made. An adjudication order will also be annulled, if in the opinion of the Court it ought never to have been made, or if the debts are paid in full,[6] that is, paid in cash to the amount of 20*s.* in the pound.[7]

[1] As to this officer, see *ante*, p. 1004. Another effect of a receiving order is that all dealings with the bankrupt, even *bonâ fide* and without knowledge of the order, cease to be protected.
[2] 46 & 47 Vict. c. 52, s. 20.
[3] Ss. 16 (3), 18 (11).
[4] 46 & 47 Vict. c. 52, s. 18; 53 & 54 Vict. c. 71, s. 3.
[5] 46 & 47 Vict. c. 52, s. 23 (2).
[6] S. 35.
[7] *In re Keet*, [1905] 2 K. B. 666.

If a friend of the bankrupt buys up the debts for less than their nominal value and is repaid his price in full by the debtor, this will not be payment in full.[1]

As soon as an adjudication order has been made, a trustee of the bankrupt's estate is appointed by a resolution of the creditors. Such resolution must be passed by a majority in value of the creditors present at the meeting. At the same time not more than five, nor less than three, creditors may be appointed to act as a committee of inspection, to assist the trustee in the realisation and distribution of the assets.[2] The appointment of the trustee and of the committee of inspection, if any, must be sanctioned by the Board of Trade. Until a trustee is appointed or during any vacancy in the office, the official receiver acts as trustee.[3]

Immediately upon the appointment of a trustee all the property of the bankrupt, whether at home or abroad, which is by law divisible amongst his creditors, passes to the trustee, whose title to it will thenceforward be recognised by every Court in the British dominions.[4] And it is the duty of the bankrupt at once to disclose and hand over to his trustee all such property. If he omits either to disclose or to hand over to his trustee any portion of such property with intent to defraud his creditors, the bankrupt is guilty of a misdemeanour; and the burden of proving that such an omission was not fraudulent rests upon the bankrupt.[5] The phrase "property divisible amongst his creditors," roughly speaking, includes all his moveable property, wherever situated, all his land within the British dominions, and most of his "things in action." It does not include property which he holds as trustee, nor property the title to which he lost by his adjudication, nor tools, wearing apparel and bedding of himself and family to a value not exceeding £20.[6] But it may include property which does not belong to him, if he has

[1] *In re Burnett* (1894), 1 Mans. 89.
[2] S. 22.
[3] Ss. 12, 21.
[4] Ss. 21, 22, 58, 169.
[5] See *ante*, pp. 369, 370.
[6] S. 44 (1), (2).

possession of it under such circumstances that he is the "reputed owner" of it.[1]

Questions of some difficulty have often arisen as to what "things in action" pass to the trustee on a bankruptcy.[2] Nearly every claim arising out of a breach of contract, even for unliquidated damages, passes to the trustee in bankruptcy and can be sold by him,[3] and so can a right to be relieved against forfeiture of a lease for non-payment of rent;[4] but a right of action for any personal wrong, such as a trespass to his person or his land, or a right of action for libel or slander, remains in the bankrupt. In short, no right of action passes to a trustee in bankruptcy where the damages are to be estimated by immediate reference to pain felt by the bankrupt in respect of his body, mind or character, and without immediate reference to his rights of property.[5]

If consequential damage to the personal estate follows from the injury to the person, it may be so dependent upon the personal injury, which is the primary cause of action, that no right to maintain a separate action in respect of such consequential damage will pass to the trustee. Moreover, the primary cause of action being personal, the right to maintain it would die with the bankrupt.

There are a few contracts as to which the right of action does not pass to the trustee, such as a promise of marriage or other contract of a purely personal character. The rights of the bankrupt under all other contracts pass to his trustee in bankruptcy. If they be profitable the trustee will see that they are duly performed and the proceeds paid into the estate; *e.g.*, he may complete a building contract or carry on the debtor's trade, if he thinks that it will be to the interest of the creditors that he should do so. But if in the opinion of the trustee the contract is an unprofitable one, he may, as a rule, repudiate it, leaving the other party to prove in the bankruptcy for damages for its non-performance.

If, however, other persons entered into the contract jointly with the bankrupt, these other persons may sue or be sued on the contract without the bankrupt being made a party to the action.[6] Nor does the bankruptcy of one party to a contract necessarily deprive the other party of his right, if any, to rescind the contract. Thus, where a buyer obtained goods under a contract of sale by false representations and then was adjudicated bankrupt, it was held that the seller was nevertheless entitled to disaffirm the contract and resume possession of the goods.[7]

When a trustee in bankruptcy brings an action to recover any debt or

[1] S. 44 (iii.).

[2] S. 50 (5); *Boaler* v. *Power*, [1910] 2 K. B. 229; and see *Colonial Bank* v. *Whinney* (1885), 30 Ch. D. 631, and *ante*, p. 777.

[3] *Ogdens* v. *Weinberg* (1906), 95 L. T. 567; but see *Bailey* v. *Thurston & Co.*, [1903] 1 K. B. 137.

*Howard* v. *Fanshawe*, [1895] 2 Ch. 581.

[5] See *Beckham* v. *Drake* (1849), 2 H. L. Cas. at p. 639.

[6] S. 114; and see *ante*, p. 1130.

[7] *In re Eastgate, Ex parte Ward*, [1905] 1 K. B. 465; *Tilley* v. *Bowman*, [1910] 1 K. B. 745.

other property belonging to his debtor, he sues in his own name, stating explicitly that he claims as "trustee under the bankruptcy of A. B." [1] He cannot in such an action join any claim which he makes in his own right.[2] He may compromise such an action with the consent of the committee of inspection, if there be one; if there be no such committee the Board of Trade must consent to the compromise.[3]

It is the duty of the trustee to get in all the assets of the bankrupt — bringing actions, when necessary, to recover them—and then to divide the assets rateably among those creditors who have proved their debts in the bankruptcy. There are, however, a few classes of debts which are entitled to priority.[4] Not all the debts of a bankrupt are provable in his bankruptcy; for instance, debts the value of which is incapable of being fairly estimated, or demands in the nature of unliquidated damages which arise otherwise than under a contract or breach of trust,[5] are not provable. A secured creditor—that is, a person who holds a mortgage, charge or lien on any property of the debtor as security for a debt due to him from the debtor [6]—cannot prove in the bankruptcy for the whole of his debt and at the same time retain his security. He may, if he thinks fit, realise his security or put a value upon it and prove for the balance of his debt after deducting the proceeds of the realisation or the value which he has put upon it. The trustee is, of course, not bound to accept the value put upon it by the creditor. He may, however, if he wishes, buy it at that value. Or the secured creditor may either hand over his security to the trustee and prove in the bankruptcy for his whole debt, or he may retain his security and not prove at all. In no event, however, can any creditor receive more than 20*s.* in the £ and such interest as is allowed by the Act.[7]

As soon as the trustee has distributed the assets among the

[1] R. S. C., Appendix A, Part III., s. VII.
[2] Order XVIII., r. 3.
[3] *In re Pilling, Ex parte Salaman*, [1906] 2 K. B. 644; 46 & 47 Vict. c. 52, ss. 22 (9), 57 (7).
[4] See the Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62).
[5] 46 & 47 Vict. c. 52, s. 37.
[6] S. 168 (1).
[7] 46 & 47 Vict. c. 52, Sched. II., rr. 9—17.

creditors who have proved in the bankruptcy, the bankrupt usually applies for his discharge. He can, indeed, do so at any time after the making of the adjudication order.[1] The Court may either

(i.) grant the discharge absolutely; or

(ii.) grant it but suspend its operation for a period;[2] or

(iii.) grant it but suspend its operation until a certain sum in the pound has been paid;[3] or

(iv.) grant it upon condition that the bankrupt shall have judgment entered up against him for a certain amount to be discharged out of his future assets;[4] or

(v.) refuse the discharge altogether.[5]

An order of discharge releases the bankrupt from all debts provable in his bankruptcy;[6] and unless there be a new consideration, a discharged bankrupt cannot make a binding promise to pay the debts from which he has thus been released.[7] But an order of discharge does not release the bankrupt from any debt on a recognisance or Crown debt or debt due in respect of a revenue offence or on a bail bond relating to revenue offences, or from any debt or liability incurred by fraud or fraudulent breach of trust or from any debt whereof he obtained forbearance by fraud.[8] Nor does it release him from any liability under a judgment in an action for seduction or under an affiliation order or under a judgment in a matrimonial cause, unless the Court expressly so orders.[9]

It only remains to add a few words as to the status of a bankrupt who has not yet applied for, or who has failed to obtain, an order of discharge. If such a bankrupt obtains credit to the extent of twenty pounds or upwards from any

[1] 53 & 54 Vict. c. 71, s. 8.
[2] In certain cases, for at least two years.
[3] In certain cases, until 10*s.* in the £ is paid.
[4] Execution cannot issue without the leave of the Court.
[5] The discharge may be granted subject to suspension and to conditions; but the suspension can only be as to amount or time, not both: *In re Walmsley* (1908), 98 L. T. 55.
[6] 46 & 47 Vict. c. 52, s. 30 (2).
[7] See *Heather* v. *Webb* (1876), 2 C. P. D. 1; *Ex parte Barrow* (1881), 18 Ch. D. 464.
[8] S. 30 (1).
[9] 53 & 54 Vict. c. 71, s. 10.

person without informing such person that he is an undischarged bankrupt, he is guilty of a misdemeanour, and may be dealt with and punished as if he had been guilty of a misdemeanour under the Debtors Act, 1869.[1] An undischarged bankrupt may, however, contract for his own work and labour, and recover money which he thus earns, as well as for materials incident and necessary to such work.[2] In doubtful cases the burden will be upon the bankrupt to prove that the money sought to be recovered does not pass to the trustee.

So if a personal tort be committed against an undischarged bankrupt, he can sue for and recover damages and expend them in the maintenance of himself and his family. The trustee cannot intercept such damages, though, if the bankrupt invests them in the purchase of property, the trustee may, perhaps, be entitled to the property.[3] The defendant in such an action is not entitled to claim security for costs—at all events, not on the ground merely that the plaintiff is an undischarged bankrupt.[4] On the other hand, if an undischarged bankrupt commits a tort, he is personally liable in damages, and his bankruptcy will afford him no defence.

[1] Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 31.

[2] But see *Emden* v. *Carte* (1881), 17 Ch. D. 169, 768; *Ex parte Vine, In re Wilson* (1878), 8 Ch. D. 364.

[3] *Ex parte Vine, supra.*

[4] *Rhodes* v. *Dawson* (1886), 16 Q. B. D. 548; *Cook* v. *Whellock* (1890), 24 Q. B. D. 658.

## Chapter VI.

### CORPORATIONS.

So far we have dealt with human beings who actually live and die. But the law also recognises certain artificial entities and treats them as persons, though they only exist in theory. Chief among these artificial persons stand corporations. A corporation consists of a number of persons, who have been formed into one body for certain definite purposes, and who have the right to sue and be sued in our Courts under a corporate name as though they were one person. A corporation almost invariably has a seal, as it can only make important contracts under seal. And what is even more important, a corporation has the right of possessing its property in perpetuity; its individual members may die or retire, but the corporation continues and retains its property without the necessity of any transfer or conveyance from member to member.

It is usual to class among corporations certain legal persons which consist of one member only. These are called corporations sole to distinguish them from all other corporations, which are termed corporations aggregate.

It was thought necessary in some cases to regard a man not as a private individual, but in his capacity as the temporary holder of a certain office, and to enable him to sue and be sued in that capacity on behalf of himself and his successors in that office. When he is so enabled, he becomes a corporation sole in his official capacity, remaining a private individual for all other purposes.[1] The earliest known corporation sole was the parish priest, whether rector or vicar; soon afterwards the Crown[2] and the bishop of a diocese were held to be corporations.

This fiction was resorted to in order to distinguish the private property of the individual occupant from the property of the see or benefice. The glebe land, for instance, passes from one incumbent to another in succession without any conveyance from his predecessor; the private property of the deceased clergyman passes of course to his executor. These ancient

[1] Corporations sole seem to be peculiar to English law; and even here the distinction between the holder and his office is not carried to its logical conclusion.

[2] See *post*, p. 1414.

corporations sole exist merely by prescription ; but latterly certain high officers of state, such as the Postmaster-General,[1] have been made corporations sole by statute.

A corporation sole, however, is not a corporation at all in the ordinary legal sense of that term, which will throughout the rest of this chapter be confined to corporations aggregate.

There are many municipal and other corporations which carry on local and even colonial government; there are also charitable corporations; but by far the greater number are trading corporations or companies. Originally corporations could only be created by letters patent, though some corporations derived their existence from prescription. Now, however, corporations—especially companies carrying on trade—are usually created under the authority of Acts of Parliament. According to their origin, therefore, corporations may be classified as follows :—

(i.) Chartered corporations, which are created by letters patent, and enjoy all the powers of a natural person, unless the grant expressly reserves any of these powers.[2] The Hudson Bay Company and the British South Africa Company are chartered companies. Municipal corporations are created by charter, but the grant of such a charter is regulated by statute.[3]

(ii.) Prescriptive corporations, which have no charter but have the same powers as chartered corporations.

(iii.) Statutory corporations and companies. There are an infinite variety of these; but they may be classed under three heads :—

(a) Those created by special statutes which completely define their powers ; for example, the Ecclesiastical Commissioners for England[4] and the Board of Agriculture and Fisheries.[5]

(b) Those created by a special statute, which incorporates a general statute. This class includes most of the companies which require compulsory powers in order to carry on business ; for example, railway and canal companies, and companies for the supply of water, gas and electricity.

(c) Those created under the provisions of a general statute. The earlier

[1] Post Office Act, 1908 (8 Edw. VII. c. 48), s. 45.
[2] See *British S. A. Co.* v. *De Beers*, [1910] 1 Ch. 354 (affirmed 26 Times L. R. 591).
[3] See Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), ss. 210—218.
[4] 19 & 20 Vict. c. 55.
[5] 52 & 53 Vict. c. 30.

statutes are not altogether repealed, and there are a few joint stock banking companies still in existence.[1]

The most important Act, under which all companies which do not require compulsory powers are now formed, is the Companies (Consolidation) Act, 1908.[2] It provides that no association or partnership for carrying on any business having as its object the acquisition of gain[3] by the association or partnership, or by its individual members, shall consist of more than twenty members[4] unless it is incorporated as a company.[5]

Companies formed under the Companies (Consolidation) Act, 1908, are of three kinds[6]:—

Companies limited by shares;
Companies limited by guarantee; and
Unlimited companies.

In the first class, the capital of the company is divided into shares, and the liability of the members is limited to the amount unpaid on their shares. In the second class, each member guarantees a certain amount—and his liability is limited to the amount which he has so guaranteed. In the third class the liability of each member is unlimited, and such companies only differ from partnerships in that (i.) they have a separate legal existence; (ii.) they may have more than ten or twenty members; and (iii.) the members may assign their shares without the consent of the other members.

In order to form a company, seven persons at least[7] must execute a Memorandum of Association,[8] which sets out the name of the company,[9] defines its powers, declares where the registered office is to be situated, and the amount of its capital,

[1] Country Bankers Act, 1826 (7 Geo. IV. c. 46); Bank Charter Act, 1844 (7 & 8 Vict. c. 113), s. 47; Joint Stock Banking Companies Act, 1857 (20 & 21 Vict. c. 49), s. 12.

[2] 8 Edw. VII. c. 69.

[3] This definition includes a number of associations which do not carry on business in the ordinary sense. Provision is made whereby such associations are not required to have the word "Limited" as a part of their name: s. 20; *Cyclists' Touring Club* v. *Hopkinson*, [1910] 1 Ch. 179.

[4] Ten members only, if the business is banking.

[5] S. 1. *In re Padstow Total Loss Association* (1882), 20 Ch. D. 137; *Jennings* v. *Hammond* (1882), 9 Q. B. D. 225; and *In re South Wales Atlantic S.S. Co.* (1876), 2 Ch. D. 763; but see *In re One & All, &c., Association* (1909), 25 Times L. R. 674. As to Trade Unions, see *post*, p. 1411.

[6] S. 2.

[7] Two will be sufficient if the company is a "private company"—that is, one which restricts the right of members to transfer shares, limits the number of members (other than employees) to fifty, and prohibits any invitation to the public to subscribe for its shares or debentures: s. 121.

[8] Ss. 2—9.

[9] If the liability of the members is limited, then the last word of the name must be "Limited": ss. 3, 4; but see s. 20.

and, if the liability of the members is to be limited, states the extent to which their liability is limited. The signatories must also undertake to accept allotment of at least one share each in the company. The memorandum is then stamped and lodged with the Registrar of Joint Stock Companies,[1] who issues a certificate of incorporation.

The memorandum of association corresponds to the charter of a company incorporated by letters patent. The company has no powers other than those set out in the memorandum. Any act done by the company or its agents outside the scope of those powers is therefore *ultra vires* and void. The memorandum can only be altered for the purposes laid down in the Act, and every alteration must be sanctioned by a judge of the Chancery Division.[2]

A company usually makes provisions regulating the exercise of its powers and defining the duties of its officers. These are embodied in a document known as the Articles of Association,[3] which is filed with the Registrar at the same time as the Memorandum of Association. If the company dispenses with Articles of Association, then the exercise of the company's powers is regulated by "Table A,"[4] which is a statutory model form of Articles of Association set out in the First Schedule to the Act.

Upon the issue of the certificate of incorporation the company acquires a separate legal existence, and, if it is a private company, it may at once commence business. All other companies, however, must allot shares before commencing business—a provision intended to secure that companies shall have an adequate working capital.

If the public are to be invited to subscribe for shares, the company must either issue a prospectus,[5] which is filed with the Registrar, or else file a document in lieu of a prospectus.[6] Both documents must contain certain particulars as to the

[1] Ss. 15—17.
[2] Ss. 7—9. An alteration in the name of the company, however, requires the consent of the Board of Trade, not of the Court: s. 8 (3).
[3] Ss. 10—15.
[4] S. 11.
[5] Ss. 80—84.
[6] S. 82.

company, so that the public may be able to form a correct opinion as to its merits. The company cannot proceed to allotment unless at least the minimum number of shares fixed by the memorandum or articles has been subscribed for. If no such minimum is fixed, then the whole issue must be subscribed for.[1] The Act also imposes certain conditions upon the allotment of shares, in order to secure as far as possible that shares shall only be allotted for money or money's worth.[2]

After allotment, an officer of the company must make and file with the Registrar a statutory declaration that the shares have been duly allotted in accordance with the requirements of the Act, and that the directors have duly paid for their qualification shares (if any).[3] The Registrar then issues a certificate that the company is entitled to commence business.[4]

If, however, the prospectus contains untrue statements, or material omissions, any person who has subscribed for shares on the faith of the prospectus may refuse to accept the shares allotted to him, avoid his contract, and apply to have his name taken off the register. He must do this as soon as possible after he becomes aware of the circumstances, or he may be held to have lost his remedy by *laches*. It is sufficient if he proves that he was misled. The Court will not inquire into the exact amount of importance which he attached to each separate statement in the prospectus.[5]

He also has an action of deceit against every director or promoter[6] or person, who is named in the prospectus as about to become a director or who has authorised the issue of the prospectus, for any loss he has thereby sustained by subscribing for shares.[7] The defendant will not be liable if he can prove that he had reasonable grounds to believe that the statement was true or that the statement was a correct extract from or summary of a public official document or from the report of an expert, but in the last case he will not escape liability if it be shown that he had no reasonable ground for believing that the expert was competent.[8]

[1] Ss. 85, 86.
[2] Ss. 88—90.
[3] S. 87 (1).
[4] S. 87 (2), (3).
[5] *Macleay* v. *Tait*, [1906] A. C. 24; but see *In re Wimbledon Olympia*, [1910] 1 Ch. 630.
[6] "Promoter" means only such promoter of the company as is a party to the issue of the prospectus or of that portion of it which contains the untrue statements. It does not include a person who is merely acting professionally for the persons who are engaged in promoting the company: s. 84 (5).
[7] S. 84.
[8] It is not enough to show that he actually believed the statements to be true. The decision to this effect in *Derry* v. *Peek* (1889), 14 App. Cas. 337, was overruled by the Directors' Liability Act, 1890, which is now repealed and replaced by s. 84: see *ante*, pp. 553, 554.

A director may, however, escape liability if he can show either that he ceased to be a director before the prospectus was issued and that it was issued without his knowledge or consent; or that as soon as he became aware that it was so issued, he gave public notice that it was issued without his knowledge or consent; or that after the issue he became aware of the untruth of the statements and gave public notice of the fact. If he does so, he will be entitled to full indemnity from the other directors, and so will a person who was held out as a director without his knowledge or consent.[1] This section creates an exception to the rule in *Merryweather* v. *Nixan*;[2] for a defendant who becomes liable to pay damages under such circumstances has a right to contribution from any other of those liable, as in cases of contract, unless he has personally been guilty of fraudulent misrepresentation and the other has not.[3]

The business of a company is usually managed by the directors, whose powers are subject to the articles of association and resolutions passed at meetings of the shareholders. The directors engage and dismiss such servants and agents as the company may require. Certain things, however, can only be done in pursuance of resolutions of the members called together for the purpose, *e.g.*, an alteration in the memorandum or articles of association.

A company ceases to exist if it be wound up. A winding-up may be either compulsory or voluntary, or subject to the supervision of the Court.[4]

A compulsory winding-up is equivalent to a bankruptcy, and is carried out under provisions in the Act similar to those in the Bankruptcy Acts.[5]

A voluntary winding-up takes place when the period, if any, fixed by the articles for the duration of the company has expired; or when the articles provide that the company shall cease to exist upon the happening of a certain condition which has happened, and a general meeting has passed a resolution for winding-up; or when a meeting of the company by special resolution[6] has resolved that it be wound up; or when a

[1] S. 84 (3).
[2] (1799), 1 Sm. L. C., 11th ed., 398, *ante*, pp. 617, 618.
[3] S. 84 (4), cf. s. 84 (3). And see *Gerson* v. *Simpson*, [1903] 2 K. B. 197; *Shepheard* v. *Bray*, [1906] 2 Ch. 235; [1907] 2 Ch. 571.
[4] S. 122.
[5] Ss. 123—181. For bankruptcy, see *ante*, p. 1390 *et seq.*
[6] A special resolution is one passed at a duly convened meeting by a majority of not less than three-quarters of the members present in person (or by proxy, if voting by proxy is allowed) and confirmed by a simple majority at another meeting held not less than fourteen days or more than a month after the first meeting: s. 69 (2).

meeting of the company by extraordinary resolution[1] has resolved that by reason of its liabilities the company cannot continue its business and that it is advisable to wind it up.[2] Creditors may, however, apply to the Court for an order for a compulsory winding-up, and the Court may grant the order, or refuse it, or order that the winding-up shall continue subject to the supervision of the Court.[3]

However the winding-up may be conducted, the duty of the liquidators who are appointed to carry out the winding-up is very similar. They must realise the assets, call upon the members to contribute according to the extent of their liability, and with the funds so raised, pay the costs of the winding-up and the company's debts and liabilities,[4] the surplus (if any) being distributed among the shareholders. Upon completion of the winding-up the name of the company is removed from the register and it ceases to exist.[5] The Registrar has also power to remove from the register the names of companies which have ceased to carry on business.[6]

The law recognises the existence of companies incorporated in foreign States or the colonies,[7] but such companies must on establishing a place of business file with the Registrar a certified copy of the company's charter, statutes, memorandum and articles, or equivalent documents,[8] a list of the directors, and the name and address of a person resident in the United Kingdom who is authorised to accept service of process and receive notices on behalf of the company.[9]

As we have seen, a corporation has a distinct personality in law; consequently, the liability of any corporation whether civil or criminal must be carefully distinguished from that of its members. If they do any act in the name of the corporation which is *ultra vires* of the corporation, the individual members are liable and not the corporation. Moreover, an

[1] An extraordinary resolution is one passed at a meeting duly convened in like manner as a special resolution, but is not confirmed : s. 69 (1).
[2] S. 182.
[3] Ss. 197, 199—204.
The priority of debts is much the same as in bankruptcy : s. 209.
[5] The Act also provides for the winding-up of unregistered companies : ss. 267—273 ; ut see *In re Londonderry Equitable Co-operative Society*, [1910] 1 Ir. R. 69.
b [6] S. 242.
[7] *Dutch West India Co.* v. *Henriques* (1724), Stra. 612, 807 ; *Janson* v. *Driefontein Mines*, [1902] A. C. 484.
[8] If such documents be in a foreign language, they must be accompanied by a translation certified to be correct.
[9] S. 274.

individual member can sue and be sued by the corporation, either in his capacity as a member to secure that the business of the corporation shall be transacted in a manner which is within its powers,[1] or in the same way as a stranger to the corporation seeking to enforce his rights against it.[2]

As a corporation cannot be physically punished and, moreover, can never be authorised to commit a crime, it is not, as a rule, liable to prosecution for any crime committed by its servants or agents on its behalf,[3] though of course such servants or agents are personally liable.

To this rule there are, however, two exceptions:—

(i.) A corporation can be indicted for misdemeanours which are, in fact, merely civil wrongs, such as the non-repair of a highway. As the corporation can only appear by attorney, it seems that it is necessary in such a case, after preferring the indictment in the ordinary way, to remove it into the King's Bench Division of the High Court by *certiorari*;[4] a corporation cannot be tried at quarter sessions.

(ii.) There are many summary offences punishable by fine, for which a corporation may be prosecuted, *e.g.*, for breaches of the Food and Drugs Act, 1875;[5] the payment of the fine imposed is enforced by distress.[6]

It has been held, however, that a company cannot be convicted of holding a lottery, but the decision was based on the terms of the Lotteries Act, 1823,[7] and the Court expressed an opinion that proceedings for a penalty might lie at the suit of the Attorney-General.[8] Again, it has been held that a company is a person within the meaning of the Dentists Act, 1878, and can therefore at the suit of the Attorney-General be enjoined from practising as a dentist.[9]

A corporation cannot be bound over to appear and prosecute, and consequently prosecutions on its behalf are undertaken in the name of one of its officers or servants. A company cannot sue for a penalty as a common informer unless expressly authorised by statute to do so.[10]

A corporation may sue for any tort which affects its property, or injures its trade or business.[11] It may maintain an

[1] *Stroud* v. *Lawson*, [1898] 2 Q. B. 44.
[2] *Metropolitan Omnibus Co.* v. *Hawkins* (1859), 4 H. & N. 87.
[3] See *King of the Two Sicilies* v. *Wilcox* (1850), 14 Jur. 751.
[4] See *R.* v. *Birmingham, &c., Ry. Co.* (1842), 3 Q. B. 223; *R.* v. *G. N. Ry. Co.* (1846), 10 Jur. 755; and also the judgment of Lord Blackburn in *Pharmaceutical Society* v. *London, &c., Supply Association* (1880), 5 App. Cas. at pp. 869, 870.
[5] 38 & 39 Vict. c. 63, s. 6; *Pearks* v. *Ward*, [1902] 2 K. B. 1.
[6] See *R.* v. *Gardner* (1774), Cowp. at pp. 84, 85; *R.* v. *Birmingham, &c., Ry. Co.* (1840), 9 C. & P. 469.
[7] 4 Geo. IV. c. 60, ss. 41, 62, 67.
[8] *Hawke* v. *E. Hulton & Co.*, [1909] 2 K. B. 93.
[9] *Att.-Gen.* v. *Smith*, [1909] 2 Ch. 524; cf. *Att.-Gen.* v. *Churchill*, [1910] 2 Ch. 401.
[10] 52 & 53 Vict. c. 63, s. 2.
[11] *South Hetton Coal Co.* v. *North-Eastern News Association, Ltd.*, [1894] 1 Q. B. 133

action for slander of its title, whether the slander be uttered by one of its own members or by a stranger.[1] Whether it can sue for wrongs which merely affect its honour or dignity is not clear; the better opinion is that it can not.[2] But it clearly cannot sue for any wrong which has been committed, not against it, but against its members individually. Nor can it bring an action, if a person publishes words which impute to it conduct of which a corporation is physically incapable.[3] The law is the same with regard to unincorporated trading companies, which may sue in the manner directed by the special Act creating them, or any statute applicable to them.[4]

A corporation is clearly liable for torts committed by its servants or officers within the scope of their authority; and the servant or officer will also be liable.[5] The corporation may still be liable although the wrongful act was done in defiance of its express orders.[6] The agent may in some cases be liable when the corporation is not, as where the performance of certain conditions is a condition precedent to the liability of the company.[7]

In those cases in which the existence of an improper motive is an essential ingredient in tort, it was formerly thought that a corporation could not be liable for the act or default of its servant or agent. Thus, Lord Selborne, in *Metropolitan Bank* v. *Pooley*,[8] suggested that a corporation could not be held liable for maintenance. It is, however, now

[1] *Metropolitan Omnibus Co.* v. *Hawkins* (1859), 4 H. & N. 87; *Trenton Insurance Co.* v. *Perrine* (1852), 3 Zab. (New Jersey) 402.

[2] *Mayor, &c., of Manchester* v. *Williams*, [1891] 1 Q. B. 94. But see *South Hetton Coal Co.* v. *North-Eastern News Association, Ltd.*, [1894] 1 Q. B. 133.

[3] See the judgment of Pollock, C. B., in *Metropolitan Omnibus Co.* v. *Hawkins* (1859), 4 H. & N. at p. 90; and the remarks of Lopes, L. J., [1894] 1 Q. B. at p. 141.

[4] *Williams* v. *Beaumont* (1833), 10 Bing. 260.

[5] See *ante*, pp. 483—487; and contrast *Bayley* v. *Manchester, &c., Ry. Co.* (1873), L. R. 7 C. P. 415, and *Goff* v. *G. N. Ry. Co.* (1870), L. R. 6 Q. B. 65, with *Allen* v. *L. & S. W. Ry. Co.* (1861), 3 E. & E. 672, and *Edwards* v. *L. & N. W. Ry. Co.* (1870), L. R. 5 C. P. 445. See also *Abrahams* v. *Deakin*, [1891] 1 Q. B. 516, and *Ruben* v. *Great Fingall Consolidated Co.*, [1906] A. C. 439. Judgments against a corporation are enforced by sequestration: Order XLII., r. 31.

[6] *Limpus* v. *L. G. O. Co.* (1862), 1 H. & C. 526; *Whatman* v. *Pearson* (1868), L. R. 3 C. P. 422.

[7] *Hirst* v. *West Riding Bank*, [1901] 2 K. B. 560 (false representations decided under Lord Tenterden's Act, *ante*, p. 696). See *Pearson* v. *Dublin Corporation*, [1907] A. C. 351.

[8] (1885), 10 App. Cas. at p. 218; see also the remarks of Alderson, B., in *Stevens* v. *Midland Ry. Co.* (1854), 10 Exch. at p. 356; of Lord Campbell, C. J., in *Whitfield* v. *S. E. Ry. Co.* (1858), E. B. & E. at p. 121; and of Lord Bramwell in *Abrath* v. *N. E. Ry. Co.* (1886), 11 App. Cas. at pp. 250, 253, 254.

established that a corporation is liable for the malice of its officers and servants.[1]

Thus, in *Citizens' Life Assurance Co.* v. *Brown*,[2] the superintendent of a life assurance company sent to several persons insured in the company a circular libelling the plaintiff, who had formerly been in its employ, but who was now canvassing for a rival company. He wrote this circular in answer to attacks made upon the company by the plaintiff; but it contained statements which he knew to be untrue. The jury found that in publishing the libel he was acting "within the scope of his employment and in the course of his employment," and awarded the plaintiff damages. On appeal, the Judicial Committee of the Privy Council held that, although the occasion was privileged, and although the superintendent had no actual authority, express or implied, to write the libel, still the company was liable as in so doing he was acting in the course of his employment.

We have already dealt with those classes of persons who are wholly or partly unable to contract, or are temporarily disabled from so doing by lunacy or drunkenness. Corporations from their artificial character are also under certain disabilities as to their capacity to contract. A chartered or prescriptive corporation has a contractual capacity limited only by the terms of its charter, if any, and by the restrictions imposed by the fact that it is an artificial, and not a natural, person.[3] A statutory corporation can make only such contracts as are contemplated in its constitution, and are within the powers expressly granted to it. "A corporation at common law has, as an incident given by law, the same power to contract, and subject to the same restrictions, as a natural person has."[4] "A statutory corporation, created by Act of Parliament for a particular purpose, is limited as to all its powers by the purposes of its incorporation, as defined in that Act." In the case of companies incorporated under the Companies (Consolidation) Act, 1908, "the memorandum of association is their fundamental law, and they are incorporated only for the objects and purposes expressed in that memorandum. . . . Contracts for objects and purposes foreign to, or inconsistent

[1] See, for instance, *Edwards* v. *Midland Ry. Co.* (1880), 6 Q. B. D. 287; *Kent* v. *Courage* (1890), 55 J. P. 264; *Rayson* v. *South London Tramways Co.*, [1893] 2 Q. B. 304; *Cornford* v. *Carlton Bank*, [1900] 1 Q. B. 22.

[2] [1904] A. C. 423; and see *Finburgh* v. *Moss' Empires, Ltd.*, [1908] S. C. 928 (Ct. of Sess.).

[3] See *British S. A. Co.* v. *De Beers*, [1910] 1 Ch. 354; affirmed 26 Times L. R. 591.

[4] *Per* Blackburn, J., in *Riche* v. *Ashbury Carriage Co.* (1874), L. R. 9 Ex. at p. 264.

with, the memorandum of association are *ultra vires* of the corporation itself. . . . No agreement of shareholders can make that a contract of the corporation which the law says cannot and shall not be so."[1] In consequence of this rule of law, the memorandum of association is nowadays framed to include every purpose which is reasonably compatible with the main object of the company's existence. All persons, whether shareholders or not, are taken to have notice of its constitution as appearing in its memorandum and articles of association.[2]

At common law, the contracts of a corporation or company are not binding unless made under seal; for "the seal is the only authentic evidence of what the corporation has done or agreed to do."[3]

Thus, a solicitor who had been employed by the corporation of Poole to conduct suits on their behalf, but had not been appointed under seal, was held unable to recover his bill of costs against the corporation.[4] So, too, where a contractor entered into an agreement not under seal with a railway company to do certain work upon their railway, and, having done some of the work, was then ordered to discontinue it by the company, it was held that he could not recover for any portion of the work so done.[5]

The general rule, however, has from early times been subject to exceptions. "Convenience amounting almost to necessity" may excuse the absence of the seal. "Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed; hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions."[6] So also where the acts are such that "an overruling necessity requires them to be done at once."[7]

[1] *Per* Lord Selborne, *ib.*, L. R. 7 H. L. at pp. 693—595. As to the reasonable application of the doctrine of *ultra vires*, see *Att.-Gen.* v. *G. E. Ry. Co.* (1887), 5 App. Cas. 478. See also *L. C. C.* v. *Att.-Gen.*, [1902] A. C. 165.

[2] *Marshall* v. *Glamorgan Iron Co.* (1868), L. R. 7 Eq. 129, 137.

[3] *Per cur.* in *Mayor of Ludlow* v. *Charlton* (1840), 6 M. & W. at p. 823; and see *ante*, pp. 664—666.

[4] *Arnold* v. *Mayor of Poole* (1842), 4 Man. & Gr. 860.

[5] *Diggle* v. *London & Blackwall Ry. Co.* (1850), 5 Exch. 442; and see *Mayor of Kidderminster* v. *Hardwick* (1873), L. R. 9 Ex. 13.

[6] *Per* Lord Denman, C.J., in *Church* v. *Imperial Gas, &c., Co.* (1838), 6 A. & E. at p. 861; cited in *Mayor of Ludlow* v. *Charlton* (1840), 6 M. & W. at p. 822, where a strong protest is made in favour of the general rule.

[7] *Per* Alderson, B., in *Diggle* v. *London & Blackwall Ry. Co.* (1850), 5 Exch. at p. 450.

A second exception occurs in cases of "accepting bills of exchange and issuing promissory notes by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon."[1] For contracts occurring in the ordinary course of a trading company's business, the seal is no longer required.[2] This exception has received statutory recognition.[3]

Thirdly, where a corporation has power by a contract under seal to order work to be done or goods to be supplied, and does so order but not under seal, nevertheless it will be held liable if it accepts the benefit of the executed order.

Thus, by the direction of the defendant corporation and with their approbation given at a regular meeting, the plaintiff did certain work upon the workhouse premises governed by the corporation. In an action of debt for goods sold and delivered, and for work and labour done, the plaintiff succeeded, although the contract was not under seal.[4] This view of the law was subsequently upheld in two similar cases,[5] and now stands established by the decision in *Lawford* v. *Billericay R. D. C.*[6] There the plaintiff, acting as defendants' engineer by agreement under seal, was instructed by them (not under seal) to act as engineer in respect of certain extension works; the defendants did not deny that they instructed him, or that the works were necessary, but relied upon the defence that the contract for the extension works was not under seal. They were, nevertheless, held to be liable. So, too, if he had been dismissed before the completion of the work, he could have recovered on a *quantum meruit*.[7]

In the case of a company incorporated under the Companies (Consolidation) Act, 1908,[8] contracts may be made by persons acting under the express or implied authority of the company by writing or by parol in the same manner as would bind private individuals. If, however, the contract is of a kind that must be under seal even if made between private individuals, it must be executed by the company under its seal in the usual manner.[9]

These exceptions, however, do not apply if a statute prescribes a particular formality. The Public Health Act, 1875, invalidates any contract of a value exceeding £50 made by

[1] *Per* Lord Denman, C.J., in *Church* v. *Imperial Gas, &c. Co.*, *suprà*.
[2] *South of Ireland Colliery Co.* v. *Waddle* (1869), L. R. 4 C. P. 617.
[3] Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 76.
[4] *Clarke* v. *Cuckfield Union* (1852), 21 L. J. Q. B. 349.
[5] *Haigh* v. *North Bierley Union* (1858), 28 L. J. Q. B. 62; *Nicholson* v. *Bradfield Union* (1866), L. R. 1 Q. B. 620.
[6] [1903] 1 K. B. 722.
[7] See *Hodge* v. *Matlock Bath U.D.C.* (1910), 74 J. P. 374.
[8] 8 Edw. VII. c. 69.
[9] S. 76.

an urban authority, unless made under seal.[1] This provision in effect fixes a limit at which corporate contracts cease to be so trifling as to make the seal unnecessary.

Thus, where an architect, on the verbal instructions of the surveyor of an urban authority, prepared plans for certain offices (which plans and offices the jury found to be necessary), it was held that, even assuming the contract was founded on an executed consideration, the architect could not succeed, as his claim was for more than £50.[2] Similarly, where an urban authority contracted without seal with X. and Company to finish works for the execution of which they had given a sealed contract to Z., X. and Company failed in their action. "The Legislature," said Lord Bramwell, "has made provisions for the protection of ratepayers, shareholders and others, who must act through the agency of a representative body, by requiring the observance of certain solemnities and formalities which involve deliberation and reflection. That is the importance of the seal. It is idle to say there is no magic in a wafer. It continually happens that carelessness and indifference on the one side, and the greed of gain on the other, cause a disregard of these safeguards. . . . The decision may be hard in this case on the plaintiffs, who may not have known the law. They and others must be taught it, which can only be done by its enforcement."[3]

A corporation is not bound by contracts which have been made on its behalf before it was incorporated.[4] It cannot, for example, merely by adopting a contract of purchase made before its incorporation, enter into contractual relations with the vendor.[5] And even if the company takes the benefit of services rendered under such a contract, it does not become liable in equity to pay for them.[6] If it is desired to make such a contract binding in law, the company, after it comes into existence, must make a new contract in the terms of the old one.[7]

If a company incorporated under the Companies (Consolidation) Act, 1908, enters into a contract before it becomes entitled to commence business,[8] it is only provisional and is

[1] 38 & 39 Vict. c. 55, s. 174 (1).
[2] *Hunt* v. *Wimbledon Local Board* (1878), 4 C. P. D. 53.
[3] *Young* v. *Corporation of Leamington* (1883), 8 App. Cas. at p. 528.
[4] *Kelner* v. *Baxter* (1866), L. R. 2 C. P. 174.
[5] *In re Johannesburg Hotel Co.*, [1891] 1 Ch. 119; *North Sydney Investment Co.* v. *Higgins*, [1899] A. C. 263.
[6] *In re English and Colonial Produce Co.*, [1906] 2 Ch. 435; and see *In re National Motor Mail Coach Co.*, [1908] 2 Ch. 515.
[7] *Natal Land Co.* v. *Pauline Colliery*, [1904] A. C. 120.
[8] See *ante*, p. 1402.

not binding until the company actually becomes so entitled.[1] Consequently, if the company be wound up before that date, the other party to the contract has no claim on it.[2]

Questions may arise as to the liabilities of shareholders, directors, promoters and others concerned with projected companies or associations. The rule is that when a person is engaged to act with others for the purpose of establishing a particular scheme, there is no partnership, nor even such a *quasi*-partnership as will make any of such persons agent for the others, for the purpose of attaining the common object.[3] If, however, by consent, conduct or ratification they authorise any one to act for them, and work is done and credit given on the faith of their responsibility, they will be liable on any contracts so made.[4]

In addition to corporations proper (that is, those which have an existence in law separate and distinct from their members), there are associations of a permanent character, which have some of the attributes of a corporation but no personality apart from that of their members, such as Trade Unions and partnerships, and associations of a less permanent character which have none of the attributes of a corporation, such as social and political clubs.[5]

Parliament has passed many statutes in order to foster thrift and providence. It has authorised the formation of Building Societies, Friendly Societies, Cost-book mining companies, etc., which have many privileges conferred upon them.[6] We can only here deal shortly with the most important of them, viz., Trade Unions.

Until 1871 all associations of masters or workmen were illegal, if their objects included anything which tended to the restraint of trade, and consequently the members were liable to be indicted for conspiracy. By the Trade Union Act, 1871,[7] this liability was removed and provisions were made establishing a register of Trade Unions,[8] and for vesting their

[1] 8 Edw. VII. c. 69, s. 87 (3).
[2] *In re Otto Electrical Manufacturing Co.*, [1906] 2 Ch. 390; *New Druce-Portland Co.* v. *Blakiston* (1908), 24 Times L. R. 583.
[3] *Reynell* v. *Lewis* (1846), 15 M. & W. 517; *Wilson* v. *Viscount Curzon*, *ib.*, 532.
[4] See *Barnett* v. *Lambert* (1846), 15 M. & W. 489, 493; *Walstab* v. *Spottiswoode*, *ib.*, 501.
[5] Legal recognition and protection is secured for these last-named associations by vesting the joint property in trustees for the benefit of the members: see *In re One and All, &c., Association* (1909), 25 Times L. R. 674.
[6] See *Catt* v. *Wood*, [1910] A. C. 404.
[7] 34 & 35 Vict. c. 31, s. 2.
[8] Ss. 7—10.

property in trustees;[1] but many contracts of trade unions were declared void, in the sense of not being enforceable in a Court of law. The Act was amended in 1876,[2] and a trade union was defined as being "any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not (before 1871) have been deemed to have been an unlawful association by reason of some one or more of its purposes being in restraint of trade."[3]

Until recently it was thought that trade unions were in no way liable for torts committed on their behalf, but it has now been decided that a trade union whether registered or not can be sued in its own name,[4] and that it can even be sued by one of its own members.[5] The law was altered by the Trade Disputes Act, 1906,[6] which enacted that "an action against a trade union whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any Court."[7] This section of the Act, which is not retrospective,[8] has, however, been held only to apply when the tortious act was done in contemplation or furtherance of a trade dispute.[9] And it is clear that a trade union can still be restrained from employing its funds for purposes not within its powers, *e.g.*, the payment

[1] Who are bound by law to execute their trusts: ss. 13—18.
[2] 39 & 40 Vict. c. 22.
[3] S. 16.
[4] *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants*, [1901] A. C. 426; *Newton* v. *Amalgamated Musicians' Union* (1896), 12 Times L. R. 623; *Trollope* v. *London Building Trades Federation* (1895), 72 L. T. 342; (1896), 12 Times L. R. 373. And see Order XVI. r. 9, and *Wood* v. *McCarthy*, [1893] 1 Q. B. 775.
[5] *Howden* v. *Yorkshire Miners Association*, [1903] 1 K. B. 308; [1905] A. C. 256; and see *Glamorgan Coal Co.* v. *South Wales Miners' Federation*, [1903] 2 K. B. 545; [1905] A. C. 239.
[6] 6 Edw. VII. c. 47.
[7] S. 4; *Bussy* v. *Amalgamated Society of Railway Servants* (1908), 24 Times L. R. 437; and see *Conway* v. *Wade*, [1909] A. C. 506.
[8] *Smithies* v. *National Association of Operative Plasterers*, [1909] 1 K. B. 310.
[9] In *Rickards* v. *Bartram* (1908), 25 Times L. R. 181, and several unreported cases. As to what is a "trade dispute," see *ante*, pp. 252—256, 626, 627.

of Members of Parliament.[1] The contracts of a trade union cannot be enforced, nor is a member entitled to sue for benefits to which he claims to be entitled under the rules of the union,[2] unless those rules are such that the union is not an illegal association at common law.[3]

[1] *Amalgamated Society of Railway Servants* v. *Osborne*, [1910] A. C. 87.
[2] *Russell* v. *Amalgamated Society of Carpenters*, [1910] 1 K. B. 506; *Mudd* v. *General Union of Operative Carpenters* (1910), 103 L. T. 45.
[3] *Gozney* v. *Bristol, &c., Trade and Provident Society*, [1909] 1 K. B. 901.

## Chapter VII.

### THE KING, HIS OFFICERS AND HIS SUBJECTS.

### *The King and his Family.*

The King is the supreme head of the realm.[1] He represents the State in its relations with other countries; the administration of the affairs of the nation is carried out by officers in his name; he is the head of the Legislature, and without his assent no measure can pass into law; he is also the head of the Navy and Army. Justice is administered by the Courts of law in his name, and the prerogative of mercy is vested in him.[2]

From very early times, the King has been regarded as a corporation.[3] "The King never dies," although the person who was King yesterday may not be alive to-day. The King, therefore, can hold property both as King and as a private individual. He cannot dispose of the property of the Crown by will, but his own property passes under his will or by intestacy according to the ordinary law of the land.

The King frequently appears as a litigant in his own Courts. All criminal prosecutions are undertaken in the King's name; and he must bring actions in the Courts to enforce most of his claims in contract or in tort.

Nevertheless, the King is not bound in all cases to take proceedings to enforce them. Debts due to the King by record or by specialty and debts due from persons liable to account to him can be recovered by execution without any previous judgment of any Court. The process is called a writ of "immediate extent,"[4] by which the sheriff is commanded to seize the debtor's chattels. If the debtor is dead, his property is still liable

[1] The succession to the Crown is vested in the descendants of the Electress Sophia of Hanover in tail general, being Protestants, by the Bill of Rights (1 Wm. & M., St. 2, c. 2), and the Act of Settlement (12 & 13 Will. III. c. 2), as amended by the Accession Declaration Act, 1910 (10 Edw. VII. & 1 Geo. V. c. 29).

[2] See *ante*, p. 1113. There are, however, certain crimes which the King cannot pardon: see *ante*, pp. 102, 137, 1162.

[3] See *ante*, p. 1398.

[4] 33 Hen. VIII. c. 39; and 13 Eliz. c. 4.

to be seized under a writ known as "*diem clausit extremum*," no matter into whose hands such property may have passed.[1] Until seizure the lands of the debtor are subject to a lien for such debts, but he can convey them free from the lien unless the debts have been duly registered against him.[2]

The King is not capable of committing a crime; he cannot be sued for any tort or breach of contract. Nevertheless, when it is alleged that the King or any officer of his has broken a contract, or wrongfully detains property or money belonging to a subject, it is usual for the King to consent to the question being tried by the Courts, and proceedings are then instituted by a Petition of Right or *Monstrans de droit*.[3]

The immunity of the King from criminal and civil process does not extend to the members of his family. The Queen Consort has, indeed, always been entitled to own property and to sue and be sued as a *feme sole*; but no member of the Royal family has any position in law other than that of a subject.[4]

### *The Officers of the Crown.*

Although "the King can do no wrong," he cannot authorise any other person to commit wrongs with impunity. High officers of State and their subordinates must answer to the law for any crime or wrong committed by them. They cannot plead that they acted in obedience to royal commands or in exercise of their administrative functions; "for the warrant of no man, not even of the King himself, can excuse the doing of an illegal act." [5] The governor of a colony is such an officer of State; he does not possess the immunity of a sovereign. Consequently he may be prosecuted or sued for any crime or tort which he may have committed, and that

[1] See *R.* v. *Pridgeon*, [1910] 2 K. B. 543.

[2] 2 & 3 Vict. c. 11; 22 & 23 Vict. c. 35; and the Crown Suits Act, 1865 (28 & 29 Vict. c. 104).

[3] For these proceedings, see *ante*, pp. 1170—1172.

[4] In order to contract a valid marriage, they must either obtain the consent of the King or fulfil certain onerous conditions: Royal Marriages Act, 1772 (12 Geo. III. c. 1). Their marriages are regulated by the common law in force before Lord Hardwicke's Marriage Act, 1753 (26 Geo. II. c. 33), for such marriages are specially excepted from that and the subsequent Marriage Acts.

[5] *Per. cur.* in *Sands* v. *Child* (1693), 3 Lev. at p. 352; *Entick* v. *Carrington* (1765). 19 St. Tr. 1030, 1067.

either in the Courts of this country or in the Courts of his own colony.[1] Thus, if a colonial governor or his deputy commits oppression, extortion or any other crime abroad, he may be tried for the same in this country.[2] And so can any other person employed in the service of the Crown abroad who commits a crime in the pretended execution of his office.[3]

We have already dealt with the immunity of judges of superior and inferior Courts respectively for acts done or words spoken in the course of their judicial functions,[4] and also with their power of committal for contempt of Court.[5] The law also affords special protection to justices of the peace[6] and to police constables.[7]

If, however, an act *primâ facie* wrongful, which affects the person or property of an alien, is done by a representative of the Crown, and either was previously sanctioned or has been subsequently ratified by the Crown, no action lies against that officer, nor will a petition of right be entertained against the Crown. Thus, in *Buron* v. *Denman*,[8] the defendant, while engaged as a naval officer in suppressing the slave trade, burnt down the plaintiff's buildings which were on a foreign shore, and released the slaves who were confined in them, and it was held that no action lay.

Again, officers of state are not liable for the acts or defaults of their servants unless done by their command. Thus, if a subordinate official in the course of his duty commits a trespass, he alone will be liable for it.[9] "The head of a Government department is not liable for the neglect or torts of officials in the department, unless it can be shown that the act complained of was substantially the act of the head himself."[10]

[1] *Mostyn* v. *Fabrigas* (1774), 1 Cowp. 161; *Cameron* v. *Kyte* (1835), 3 Knapp, P. C. C. 332; *Phillips* v. *Eyre* (1870), L. R. 6 Q. B. 1; *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102. The Lord Lieutenant of Ireland is an exception: *Tandy* v. *Earl of Westmoreland* (1792), 27 St. Tr. 1246; and see *Luby* v. *Lord Wodehouse* (1865), 17 Ir. C. L. R. 618; *Sullivan* v. *Earl Spencer* (1872), 6 Ir. R. C. L. 173. As to the proclamation of "martial law," see *Marais* v. *General Officer Commanding*, [1902] A. C. 109; *Ex parte Mgomini* (1906), 94 L. T. 558.

[2] 11 Will. III. c. 12; *Picton's Case* (1804), 30 St. Tr. 225; and see *R.* v. *Eyre* (1868), L. R. 3 Q. B. 487.

[3] 42 Geo. III. c. 85, s. 1.

[4] See *ante*, pp. 476, 477, 525.

[5] See *ante*, p. 196.

[6] See *ante*, pp. 475, 476.

[7] See *ante*, pp. 473—475.

[8] (1859), 2 Exch. 167; see also *Cook* v. *Sprigg*, [1899] A. C. 552; *Salaman* v. *Secretary of State for India*, [1906] 1 K. B. 613; and cf. *West Rand Mining Co.* v. *R.*, [1905] 2 K. B. 391.

[9] *Raleigh* v. *Goschen*, [1898] 1 Ch. 73; *Bainbridge* v. *Postmaster-General*, [1906] 1 K. B. 178; cf. *R.* v. *Earl of Crewe*, [1910] 2 K. B. 576.

[10] *Per* Romer, J., in *Raleigh* v. *Goschen*, [1898] 1 Ch. at p. 77.

*British Subjects.*

The subjects of the Crown include all persons who are under the permanent allegiance of the Crown; firstly, every person born within the British dominions, no matter what the nationality of his father may have been,[1] except the children of a foreign sovereign, of an ambassador or other minister accredited to this country and of his suite or staff,[2] and the children of alien enemies who at the time of the birth of such children are in hostile occupation of the place where the birth takes place;[3] secondly, every person born out of the British dominions, whose father or paternal grandfather was born within the British dominions, provided that his father was a British subject and not in the service of an alien enemy at the time of the birth;[4] thirdly, every person born out of the British dominions, but whose father was at the time of his birth a British ambassador or minister accredited to the country in which such person was born, or a member of the suite or staff of such ambassador or minister;[5] fourthly, every person who becomes naturalised under the Naturalization Act, 1870,[6] or who receives a grant of letters of denization,[7] and his wife and such of his children as are under age and residing with him;[8] and fifthly, every alien woman who marries a British subject.

A person ceases to be a subject, firstly, on becoming sovereign of another State;[9] secondly, if he is born a British subject, but under the laws of another State, and after attaining his majority elects to be the subject of that other State, and makes a declaration of alienage;[10] thirdly, if he becomes naturalised in a foreign country;[11] and fourthly, a woman,

[1] *Calvin's Case* (1608), 7 Rep. 5a; *Aeneas Macdonald's Case* (1747), 18 St. Tr. 857; but see *Isaacson* v. *Durant* (1886), 17 Q. B. D. 54.
[2] Westlake, Private International Law, 4th ed., pp. 348—351.
[3] *Calvin's Case* (1608), 7 Rep. 18a, 18b.
[4] 7 Anne, c. 5, s. 3; 4 Geo. II. c. 21, s. 1; 13 Geo. III. c. 21; and see Naturalization Act, 1870 (33 & 34 Vict. c. 14).
[5] *Calvin's Case*, *suprà*; but see *De Geer* v. *Stone* (1882), 22 Ch. D. 243.
[6] 33 & 34 Vict. c. 14.
[7] 12 & 13 Will. III. c. 2, s. 3; see Westlake, p. 352; and 33 & 34 Vict. c. 14, s. 13.
[8] 33 & 34 Vict. c. 14, ss. 2, 10.
[9] As, for example, when H.R.H. the Duke of Edinburgh became Duke of Saxe Coburg Gotha, a State of the German Empire.
[10] 33 & 34 Vict. c. 14, s. 4.
[11] *Ib.*, s. 6.

who is a British subject and marries an alien, takes her husband's nationality.

Various disabilities affecting both natural and artificial persons have been dealt with in the preceding chapters of this Book. It only remains here to discuss the disabilities of subjects who have come under the ban of the law. A person who has been convicted of a misdemeanour, as a rule, suffers no loss of status. He is still as capable of exercising his rights as any other person, but, of course, if sentenced to imprisonment he cannot, without leave, do any act which necessitates his presence outside the prison in which he is confined. A person who has been convicted of a felony and sentenced to penal servitude is in a very different position. While undergoing his sentence, he cannot bring an action "for the recovery of any property, debt or damage whatsoever," [1] or make a valid contract; but he can do so when he is out on "ticket-of-leave." [2] His property on his conviction is entrusted to the care of the Administrator of Felons' Property, who has "absolute power to let, mortgage, sell, convey, or transfer any part of such property as to him shall seem fit." [3] After serving his sentence a convicted person resumes his ordinary civil rights.

Outlawry was formerly the ordinary process by which a person was compelled to appear before a Court of justice to answer a criminal charge or a civil claim made against him. If, after formal summons, he did not appear he was declared to be an outlaw, that is, he was placed outside the protection of the law and, at one time, it was even said that he could be slain with impunity.[4] It is still possible for a person who is accused of a criminal offence to be made an "outlaw." [5] An outlaw's chattels are forfeited to the Crown [6] and he is incapable of doing any legal act, of suing or being sued, of giving evidence or of serving as a juror.[7]

[1] It is doubtful whether the word "damage" includes a tort which is not based on actual damage to property.

[2] Forfeitures Act, 1870 (33 & 34 Vict. c. 23), ss. 8, 30.

[3] *Ib.*, s. 12; and see *Carr* v. *Anderson*, [1903] 1 Ch. 90; *In re Gaskell and Walters* (1906), 22 Times L. R. 464.

[4] See *ante*, p. 257.

[5] 25 Edw. I. c. 29; 18 Edw. III. St. 1, c. 1; 18 Edw. III. St. 2, c. 4. Outlawry in civil proceedings was abolished in 1879 (42 & 43 Vict. c. 59, s. 3).

[6] Specially excepted from the Forfeitures Act, 1870 (33 & 34 Vict. c. 23), s. 1.

[7] Juries Act, 1870 (33 & 34 Vict. c. 77).

*Aliens.*

Foreign sovereigns and their representatives are not subject to the jurisdiction of the English criminal Courts. If they commit crimes while in England, the only remedy is to require them to leave the country.[1]

They can, however, enforce their civil rights by action in our Courts, but by so doing they submit themselves to the jurisdiction of the Court and so enable it to adjudicate upon any claims which the defendant has against them arising out of the subject-matter of the action,[2] but not upon any mere cross claims.[3] As to all other claims against them they are outside the jurisdiction of the Courts.[4] Unless they voluntarily submit to that jurisdiction,[5] the Court has no power to try an action brought against them. Again, if any person does an act within the territory of a foreign sovereign by his authority, our Courts will not inquire into its legality; such an act will be regarded here as justified by the law of that country.[6]

We have already discussed the position of companies incorporated in a foreign country.[7] It now remains to deal with an alien, that is, a natural person who does not owe allegiance to the Crown. It has been said that, strictly speaking, no alien has a legal right to enter this country, but as a matter of fact all aliens are freely admitted, unless they come within the provisions of the Aliens Act, 1905,[8] which exclude aliens who, by reason of their physical defects or poverty, are undesirable immigrants into this country. Every foreigner who enters the realm, for however short a time, owes the

[1] Westlake, International Law, Part I., p. 266.

[2] *Yzquierdo* v. *Clydebank Engineering Co.*, [1902] A. C. 524; *U.S.A.* v. *Prioleau* (1865), 2 H. & M. 559; *U.S.A.* v. *McRae* (1867), L. R. 3 Ch. 79; *Republic of Peru* v. *Dreyfus* (1888), 38 Ch. D. 348.

[3] *Imperial Japanese Government* v. *P. & O. Co.*, [1895] A. C. 644; *Strousberg* v *Republic of Costa Rica* (1880), 29 W. R. 125; *S. A. Republic* v. *La Compagnie Franco Belge*, [1898] 1 Ch. 190.

[4] *Mighell* v. *Sultan of Johore*, [1894] 1 Q. B. 149; *The Parlement Belge* (1880), 5 P. D. 197, followed in *The Jassy*, [1906] P. 270; *Macartney* v. *Garbutt* (1890), 24 Q. B. D. 368; *Musurus Bey* v. *Gadbán*, [1894] 1 Q. B. 533.

[5] *Taylor* v. *Best* (1854), 14 C. B. 487.

[6] *Dobree* v. *Napier* (1836), 2 Bing. N. C. 781; *R.* v. *Lesley* (1860), Bell, 220; *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176.

[7] See *ante*, p. 1404.

[8] 5 Edw. VII. c. 13.

King allegiance during his stay, and is subject to our laws.[1] He will be liable, therefore, for every crime or tort which he commits within the jurisdiction of the English Courts. If he leaves England before he is prosecuted for a crime which he is alleged to have committed, he may, as a rule, be brought back under the Extradition Acts or the Fugitive Offenders Act.[2] But in the case of a tort committed by an alien who has left England before the writ is issued, the plaintiff will have great difficulty in obtaining leave under Order XI., to issue a writ to be served on him abroad.[3] An alien will also be liable civilly for any tort committed abroad, if the tort is also either a tort or a crime by the law of the place where it was committed, provided he is now within jurisdiction and can be served with a writ.[4]

An alien is not subject to the criminal jurisdiction of Courts of the British Empire, unless he commits a crime within the British dominions or on board a British ship. Thus, if a foreigner kills another foreigner, or even a British subject, on the high seas on board a foreign ship, he is in no way amenable to the law of England, or triable in England except in a case of piracy.[5]

The rights of an alien whose country is at war with this country are quite different from those of an alien whose country is at peace with us. An alien enemy is in a similar position to an outlaw, but he, too, is protected from being wantonly killed or outraged.[6] An alien enemy cannot maintain an action in our Courts, unless he be licensed to do so: the burden is upon him to establish the licence under which he claims to sue. British subjects "adhering to the King's enemies" are treated as alien enemies.[7]

It is doubtful whether the defendant can waive the plaintiff's incapacity, for "the objection being one based on considerations of public policy

[1] *R.* v. *Jean Peltier* (1802), 28 St. Tr. 617.
[2] See note 3, *ante*, p. 1038.
[3] See *ante*, p. 1178, and *Bree* v. *Marescaux* (1881), 7 Q. B. D. 434; but see *Tozier* v. *Hawkins* (1886), 15 Q. B. D. 650, 680.
[4] *Machado* v. *Fontes*, [1897] 2 Q. B. 231; *Carr* v. *Fracis Times & Co.*, [1902] A. C. 176.
[5] *R.* v. *De Mattos* (1836), 7 C. & P. 458; *R.* v. *Serva* (1845), 1 Cox, 292; *R.* v. *Lewis* (1857), Dearsl. & B. 182.
[6] See *ante*, p. 257.
[7] *Netherlands S. A. R. C.* v. *Fisher* (1901), 18 Times L. R. 116.

affecting the Sovereign, his Courts should be held bound to take notice of the inability to sue." [1] Upon the resumption of peace, his rights again become those of an alien friend ; they are not extinguished by the war.

All private trading with an alien enemy is illegal without the King's licence. [2] "Undertaking by contract to indemnify the King's enemies against loss inflicted by the King's forces is also illegal." [3] "If a loss has taken place before the commencement of hostilities, the right of action on a policy of insurance, by which the goods lost were insured, is suspended during the continuance of war and revives on the restoration of peace." [4] A corporation incorporated in a country at war with Great Britain is an alien enemy, even if all its members are subjects of the British Crown.[5]

An alien friend, on the other hand, has the same right to the protection of the law as a British subject.[6] Thus an alien friend residing abroad may sue in England on any contract made with him or for any tort committed on him in England.[7] In contract the jurisdiction depends upon the nature and terms of the contract itself. In tort the place where the tort was committed is the test of jurisdiction, not the domicil of the plaintiff or the defendant. But any plaintiff whose ordinary place of residence is not in the British Isles will, as a rule, be ordered to give security for costs, unless he either has real property within jurisdiction available in execution, or is co-plaintiff with others resident in England.[8]

An alien, who has been convicted of an offence for which he is liable to be sentenced to imprisonment without the option of a fine, or who—though he has not committed any crime in this country—has been found by the Court, within twelve months of his arrival in this country, to have received poor relief at any time during the three months prior to the commencement of the proceedings, or to be wandering without visible means of subsistence, or to be living in insanitary conditions due to overcrowding, or to have been convicted abroad of a crime for which a person is liable to extradition, may be

[1] *Per* Lord Davey in *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C. at p. 499.
[2] *The Hoop* (1799), 1 Rob. (C.) 196. See *Dunn* v. *Bucknall Bros.*, [1902] 2 K. B. 614.
[3] *Per* Earl of Halsbury, L. C., in *Janson* v. *Driefontein Consolidated Mines, Ltd.*, [1902] A. C. at p. 494.
[4] *Per* Lord Davey, *ib.*, at p. 499.
[5] See the remarks of Lord Macnaghten, *ib.*, at p. 497.
[6] Except as mentioned *ante*, p. 1416. As to when an alien can be made a bankrupt, see *ante*, p. 1390.
[7] *Pisani* v. *Lawson* (1839), 6 Bing. N. C. 90.
[8] Order LXV., r. 6 A ; 31 & 32 Vict. c. 54, s. 5.

recommended for expulsion.[1] Thereupon the Secretary of State considers the matter and in a proper case orders him to be expelled from this country. Unless the Court has referred the matter to him in this way, the Home Secretary has no power to expel any person.

A British subject, on the other hand, cannot be expelled. It is the right of every Englishman to live and die in his own country.

[1] Aliens Act, 1905 (5 Edw. VII. c. 13), s. 3 (1); and see *ante*, p. 1104.

## Chapter VIII.

### THE LEGAL PROFESSION.

The early history of the legal profession in England is involved in obscurity. At first everyone had to be his own advocate in any litigation, civil or criminal, unless he had express permission to appoint a deputy, who was called his "attorney."[1] Sometimes this deputy had literally to fight for his principal. Such champions or attorneys acted without remuneration each for his own friend, and probably on one or two occasions only in his life. There were no professional lawyers; and advice on legal matters could only be obtained, for what it was worth, from priests. Every freeholder was supposed to know his rights.

In 1207, however, the clergy were prohibited by their canons from practising in the Secular Courts; and in 1215 the Court of Common Pleas was fixed by Magna Carta "in one certain place." Thereupon many persons made a habit of attending the sittings of this Court and noting its decisions. They thus acquired a knowledge of the procedure of the Court as well as of the law of the land, and were willing to act as advocates in Court and also to assist suitors in matters preliminary to the hearing. Dugdale tells us that "King Edward I., in the twentieth year of his reign (1292), did especially appoint John de Metingham (then Chief Justice of the Court of Common Pleas) and the rest of his fellow Justices (of that Court) that they, according to their discretions, should provide and ordain from every county, certain attorneys and 'apprentices in the law,' of the best and most apt for their learning and skill, who might do service to his Court and people: And that those, so chosen onely, and no other, should follow his Court, and transact the affairs therein: the said King and his Council, then deeming the number of seven

[1] See Statute of Westminster II., 1285 (13 Edw. I. c. 10).

score to be sufficient for that employment; but it was left to the discretion of the said Justices, to add to that number, or diminish, as they should see fit. So that, soon afterwards, though we have no memorial of the direct time, or absolute certainty of the places; we may safely conclude, that they setled in certain Hostells or Inns, which were thenceforth called Inns of Court." [1]

This appears to be the first formal recognition by the State of a professional class of advocates, on whom apparently was conferred at this early date the exclusive right of audience in Court in cases where the parties themselves desired legal assistance, and in the Court in which at that time actions between private persons could alone be brought. It will be seen that according to Dugdale the duty of selecting the original body of 140 advocates, and the right of subsequently adding to their number, was conferred on the judges of the Court of Common Pleas. But there are no records to support this statement. We know that previously to this time students of the law had gathered around certain churches in London, living in hostels in the immediate neighbourhood, and arguing questions of canon law with the priests. And although the Courts were subsequently held at Westminster, the students and apprentices of law continued to occupy their former homes just outside the walls of the City of London. They gradually formed themselves into private societies, closely resembling the colleges of Oxford and Cambridge, and governed by their Benchers as those colleges were by their Fellows. These societies consisted of two classes [2]:—

1. Inns of Court, which comprised advocates in the Courts, who had not arrived at the degree of serjeants-at-law, and also the more advanced apprentices.

2. Inns of Chancery, where dwelt the "Clerks of the Chancery," who prepared the original writs which issued from the Chancery, and also the younger apprentices who

[1] *Origines juridiciales*, 1666, p. 141.

[2] There were also two (if not three) Serjeants' Inns, membership of which was restricted to the judges of the Superior Courts of Law at Westminster and Serjeants-at-law. These no longer exist. There is only one Serjeant still surviving.

acquired some elementary knowledge of civil procedure by copying those writs.

And in spite of what Dugdale tells us above, it is clear that, from the first days of which we have knowledge, it was the Benchers of the four Inns of Court, and not the judges of the Common Pleas, who possessed the exclusive right of enabling a man to practise in any of the Superior Courts.[1]

How the Inns of Court acquired this privilege it seems now impossible to discover. Nor is it clear why the Inns of Chancery did not possess it also; for some of these—Thavie's Inn, for instance—appear to have existed before any of the present Inns of Court. But the four Inns of Court in some way acquired the mastery; they are described by James I. in his charter of August 13th, 1608, as "those four colleges, the most famous in all Europe." The Inns of Chancery, on the other hand, fell into the second rank, and were indeed eventually parcelled out among the Inns of Court. Thus to the Inner Temple were attached Clifford's Inn, Lyon's Inn and Clement's Inn; to the Middle Temple, the Strand Inn, New Inn, and a third, of which even the name is now forgotten; to Lincoln's Inn, Thavie's Inn and Furnival's Inn; and to Gray's Inn, Staple Inn and Barnard's Inn.

There being no printed books in early times, instruction in law was given orally. Each Inn of Court appears to have periodically sent a reader to every Inn of Chancery attached to it. The reader was accompanied by two "utter barristers," who discussed points of law and presided over "moots." This committee of three had the power of bringing over each term the two most promising students of the Inn of Chancery and passing them into the Inn of Court. Hence many students entered an Inn of Chancery in the first instance and were thence transferred to an Inn of Court. But by the time of Sir Matthew Hale this custom had become obsolete. The Inns of Chancery gradually fell into the possession of solicitors, and now have all ceased to exist.[2]

The legal profession now comprises three classes of practitioners:—

(i.) Barristers at Law. These may be either "utter barristers" (now more frequently called "junior barristers") or King's counsel. An utter barrister is a person who was formerly a student of an Inn of Court and who has been "called to the Bar" by the Benchers of his Inn and at his

[1] See the "Pension Book of Gray's Inn," Introduction by Rev. R. J. Fletcher, at pp. xiii., xiv.

[2] See *Smith* v. *Kerr*, [1902] 1 Ch. 774.

Inn. A King's counsel is a barrister whom the King has been graciously pleased to make one of his counsel learned in the law, and whom, therefore, the judges have called "within the Bar" at the Royal Courts of Justice.

(ii.) Solicitors. Until the year 1875 the term "solicitor" was restricted to persons who conducted suits in the Court of Chancery, while those who so acted in the Courts of common law were called "attorneys," and those who practised in the Admiralty, Probate, Divorce and other ecclesiastical Courts were known as "proctors." But now these gentlemen are all "Solicitors of the Supreme Court," and can transact business in any of the above-mentioned Courts.[1]

(iii.) Notaries Public.

(i.) *Barristers.*

No person can be called to the Bar, and, therefore, no person can become a judge, unless he is a member of an Inn of Court. ~~No woman can become a member of an Inn of Court, and therefore no woman can be called to the Bar.~~ The Benchers of the four Inns of Court in London possess the monopoly of calling men to the English Bar. They have also power, in their discretion, to disbar barristers of their Inn who in their opinion have been guilty of professional misconduct or have been convicted of crime. No one has in strict law a right to be admitted as a student,[2] to be called to the Bar,[3] or to be restored if disbarred.[4] The Inns of Court are not subject to the jurisdiction of the Courts of law, but only to the control of the judges as visitors.[5]

A man who desires to enter an Inn of Court must in the first place have passed an examination at some University in the British Dominions, approved by the Council of Legal Education, which entitles him to a degree, or some other of the Examinations set out in the Schedule to the Consolidated Regulations of the four Inns. He must also lodge certificates of good character and make a declaration in the prescribed

[1] Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 87; Legal Practitioners Act, 1876 (39 & 40 Vict. c. 66); Solicitors Act, 1877 (40 & 41 Vict. c. 25), ss. 17, 21.
[2] *R.* v. *Benchers of Lincoln's Inn* (1825), 4 B. & C. 855.
[3] *R.* v. *Benchers of Gray's Inn* (1780), 1 Doug. 353.
[4] *Booreman's Case* (1642), March, 177.
[5] See *Neate* v. *Denman* (1874), L. R. 18 Eq. 127.

form. He will then be admitted to his Inn, where he must "keep," as a rule, twelve terms. He must pass both parts of the Bar Examination, be proposed for call by a Bencher of his Inn, and duly "screened" in the Hall of each of the four Inns. If no valid objection be made, he will then in due course be called to the Bar.

Any solicitor who has been "in practice for not less than five consecutive years, either in England or in any Colony or Dependency, but who in either case was admitted in England," [1] and who desires to be called to the Bar, must in the first place give at least twelve months' notice in writing to each of the four Inns of Court, and to the Law Society, of his intention to seek call to the Bar, and produce a certificate that he is a fit and proper person to be called to the Bar. Such certificate must be signed, if his practice was in England, by two members of the Council of the Law Society, and, if his practice was in a Colony or Dependency, by the Chief Justice of such Colony or Dependency. Next, he must cease to be a solicitor and then enter as a student at one of the Inns of Court. This he can do at any time during the currency of his notice. He must pay the same fees as are payable by other Bar students, make the usual deposit, and pay the sum of five guineas for the above-mentioned notice in addition to the usual student's fees. When the twelve months have expired, he must present himself for the Bar Examination. He must pass both parts of this examination; and he can then be called to the Bar without having kept any terms.

All barristers, whether King's counsel or juniors, can act as advocates in all law Courts,[2] and advise on questions of law. Junior counsel can also draft wills, conveyances, pleadings, affidavits, and other legal documents, and can take pupils. The practice of a barrister is a purely personal one, and does not admit of anything in the least resembling partnership. A barrister has an exclusive right of audience as advocate in the House of Lords, Privy Council, Supreme Court of Judicature, Central Criminal Court and Assizes. In Courts of county and borough quarter sessions exclusive audience is given to barristers whenever a sufficient number regularly attend the Court.[3] In County Courts, Sheriffs' Courts, Coroners' Courts, Ecclesiastical Courts, and Courts of Petty Sessions, they have no exclusive right of audience;

[1] Consolidated Regulations of the four Inns of Court, r. 15.

[2] Except at revising barristers' Courts (6 & 7 Vict. c. 18, s. 41; and see *O'Connor* v. *Nicholson* (1891), 1 Fox & S. Reg. 250); and except by leave of the Commissioners, at inquiries by Royal Commissioners, or under the Charitable Trusts Act, 1860 (23 & 24 Vict. c. 136), &c.

[3] See *Ex parte Evans* (1846), 9 Q. B. 279.

solicitors may also act as advocates in these Courts, as well as at Chambers in the High Court of Justice.

By the etiquette of the Bar a barrister should not undertake any paid professional work for a lay-client except on the instructions of a solicitor. But there are some exceptions to this rule. On the trial of an indictment or on the hearing of an appeal under the Criminal Appeal Act, 1907, a barrister in court may be instructed directly by the prisoner from the dock, and the same exception holds good where a judge in criminal trials requests a barrister to give his honorary services to a prisoner. Again, counsel may appear before parliamentary committees on the instructions of parliamentary agents who need not be solicitors, and in inquiries under the Local Government Acts, the Public Health Acts, or the Light Railways Act on the instructions of clerks to local authorities. A barrister can make a will for another person, and also advise in non-contentious business, without the intervention of a solicitor, though neither practice is as a rule desirable.

At the trial of an action in the High Court, any party who does not appear in person must employ both a solicitor and a barrister: in cases of importance he generally retains two barristers, a King's Counsel, as well as a junior. The solicitor prepares the case for trial, and instructs the barrister by delivering a "brief" at the barrister's chambers. A barrister must accept any brief offered to him at a proper professional fee in any of the Courts in which he professes to practise, unless there are special circumstances which justify his refusal to do so. He can demand the payment of the fee when the brief is delivered, and in the event of it not being paid may refuse to accept the brief. But a barrister cannot bring an action to recover any fee which he has earned by professional services; for it is an *honorarium*.[1]

The brief is the visible sign of the barrister's authority to appear and act for the lay-client at the trial; and the lay-client, having thus instructed counsel, cannot himself be heard unless, before the case comes on for hearing, he revokes the barrister's authority by withdrawing the brief. A barrister is entitled, unless he knows the contrary, to assume that every fact stated in the brief is true, and to fight the case boldly and fearlessly on that assumption. No action will lie against him for any words, however defamatory,

[1] *Kennedy* v. *Broun* (1863), 13 C. B. N. S. 677; and see the remarks of Lindley, L. J., in *In re Le Brasseur and Oakley*, [1896] 2 Ch. at pp. 493, 494.

spoken by him as advocate in the course of any judicial proceeding with reference thereto. This is so, whether such words be an attack upon the opposite party, or any witness, or upon an absent third person—and even though it be alleged that the words were spoken maliciously, without any justification or excuse, and were irrelevant to every question of fact which was in issue before the tribunal.[1]

The delivery of a brief to a barrister gives him "complete authority over the suit, the mode of conducting it, and all that is incident to the management of the trial; but he has not by virtue of his retainer in the suit any power over matters that are collateral to it."[2] It is for him to decide what witnesses he will call or not call. He can consent to a reference of all, or any, of the issues in the action. He has authority to make all such admissions, as in the honest exercise of his discretion he may think proper in the conduct of the case; and such admissions will bind his client so far as that action is concerned, though not necessarily in any subsequent action. Again, counsel has full authority to compromise the action in which he is instructed either by consenting to judgment, withdrawing a juror, or in any other way, unless he be expressly forbidden to do so by his client at the time, and unless the compromise includes or affects matters outside the scope of the action.[3] The terms of the compromise should be indorsed on the brief of each of the opposing counsel, and each indorsement signed by them both. All parties to the action are subsequently entitled to inspect the indorsement made by any counsel on his brief, though not, of course, to see its contents, which are privileged from the inspection of any opponent.[4] The terms of such a compromise will be strictly enforced, if necessary, by an order of the Court.

Thus where, in an action for malicious prosecution, the defendant's counsel, in the absence and without the express authority of his client,

[1] *Munster* v. *Lamb* (1883), 11 Q. B. D. 588.
[2] *Per cur.* in *Swinfen* v. *Lord Chelmsford* (1860), 29 L. J. Ex. at p. 397.
[3] *Strauss* v. *Francis* (1866), L. R. 1 Q. B. 379; *Lewis* v. *Lewis* (1890), 45 Ch. D. 281; *Neale* v. *Gordon Lennox*, [1902] A. C. 465; cf. *Little* v. *Spreadbury*, [1910] 2 K. B. 658; see *post*, p. 1435.
[4] *Walsham* v. *Stainton* (1863), 2 Hem. & Mil. 1.

consented to a verdict for the plaintiff with costs, and to a withdrawal of all imputations against the plaintiff, it was held that the settlement was within the apparent general authority of counsel and was binding on the client.[1] On the other hand, where in a suit in Chancery an order was made for the trial at assizes of an issue as to the validity of a will under which the plaintiff claimed an estate, and counsel for the plaintiff, in her absence and without any express authority from her, agreed in court to a compromise that the estate should be conveyed by the plaintiff to the defendant in fee, and that the defendant should secure an annuity to the plaintiff, it was held that her counsel had no authority to enter into such a compromise without express instruction from the client and that it did not therefore bind her.[2]

So, where counsel settled an action for breach of promise of marriage without the express consent of the plaintiff upon the terms that a sum of money should be paid by the defendant to the plaintiff, that the letters written by the defendant to the plaintiff should be returned to him, and that the plaintiff should not molest the defendant, it was held that the plaintiff's counsel had no authority to consent to the two latter terms on the ground that they were outside the scope of the action.[3]

We may mention further that a practising barrister possesses certain minor privileges. He is exempt from serving on any jury, or as a constable. He cannot be compelled under *subpœna* to give evidence as to what had been stated by him in a former case. Should, however, he consent to do so, the correct course is for him to make his statement from his place in court without being sworn.[4] He cannot be arrested on civil process when on circuit or when going to or returning from the Supreme Court. Barristers alone are eligible for certain judicial and other offices; on the other hand, they are disqualified from acting either directly or indirectly in the capacity of a solicitor, notary public, patent agent, land agent, surveyor, consulting engineer, or accountant, and from holding certain appointments which are regarded as the exclusive property of solicitors.[5] Any dealings between members of the Bar and solicitors as regards sharing costs or profits in any shape are incompatible with the discipline of the Bar.[6]

[1] *Matthews* v. *Munster* (1887), 20 Q. B. D. 141.
[2] *Swinfen* v. *Swinfen* (1857), 1 C. B. N. S. 564.
[3] *Kempshall* v. *Holland* (1895), 14 R. 336.
[4] *Baillie's Case* (1778), 21 St. Tr. 340; *Hickman* v. *Berens*, [1895] 2 Ch. 638, 641; *Kempshall* v. *Holland*, *supra*.
[5] See r. 25 of the Consolidated Regulations of the four Inns of Court.
[6] *Ib.*, r. 16.

## (ii.) *Solicitors.*

It has been said of solicitors that no other profession "is so stringently regulated or so jealously supervised by the State. From the first day of his apprenticeship to the last day of his practice every action of the solicitor is subject to regulations laid down by Parliament; his education, his right to practise, his relations to his employers, his remuneration, all are minutely prescribed by the Legislature."[1]

Their chief organisation is the Law Society, whose head-quarters are in Chancery Lane. This Society was founded in 1825; it has been incorporated by four successive charters dated respectively, 1831, 1845, 1872, and 1903. It now conducts the examinations which a man must pass before he can be admitted and entered on the roll of solicitors; it has a staff of lecturers and tutors who instruct articled clerks in law; and its disciplinary committee hears complaints made against solicitors and applications made to strike them off the roll.[2]

No man[3] is qualified to be a solicitor unless he is a British subject and has—

(i.) Duly served as clerk to a practising solicitor under binding articles for a period varying from three to five years.

(ii.) Passed all necessary examinations. There are three of these: the preliminary, the intermediate, and the final; but other examinations may be accepted in lieu of the first two.

(iii.) Been duly admitted and entered on the roll of solicitors, which is kept by the secretary of the Law Society, in his capacity as registrar of solicitors.

The solicitor of a Public Department of State need not be a solicitor, or admitted or enrolled as a solicitor, or take out any certificate to practise.[4] Any barrister of not less than five years' standing, who has procured himself to be disbarred with a view to becoming a solicitor, and has obtained from two of the Benchers of the Inn to which he belonged a certificate that he is a fit and proper person to practise as a solicitor, is not required to serve under any articles or to pass any examination except the final

[1] See "A Short History of Solicitors," by Mr. E. B. V. Christian.

[2] Solicitors Act, 1888 (51 & 52 Vict. c. 65), ss. 12—15.

[3] No woman has ever yet been admitted a solicitor, though there is nothing in any of the Solicitors Acts to prevent this.

[4] Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12; and see 54 & 55 Vict. c. 39, s. 43 (3).

examination. On passing this, he is entitled to be at once admitted and enrolled as a solicitor.[1]

Although a solicitor has been duly admitted and his name entered on the roll, he cannot practise unless he annually takes out a certificate and causes it to be duly stamped. This certificate is given by the registrar of solicitors, who is the secretary of the Law Society. The certificate of a country solicitor does not enable him to practise in town. Hence nearly every country solicitor employs a London solicitor to act as his town agent. The ordinary rules of the law of principal and agent apply to such a case.[2]

A solicitor who practises without having first taken out such a certificate is liable to a penalty of £50.[3] Moreover, he cannot recover from his client any costs, fees, rewards, or disbursements for any work done or proceeding taken while he was without a certificate.[4] The certificate ought strictly to be taken out on November 16th in each year. A solicitor is, however, allowed a whole month from that date in which to take it out. If he takes out a certificate on or before December 16th, it will bear date and relate back to November 16th. If he does not take it out till after December 16th, he is disqualified till he does take one out; and the certificate when taken out will not relate back, so that for work done in the interval the solicitor cannot recover any remuneration.[5]

A solicitor who neglects for a whole twelvemonth to renew his certificate is no longer entitled to renew it as of right; he must apply for leave to the registrar of solicitors, who then has a discretion to grant or refuse the application.[6] The registrar has a similar discretion whenever the solicitor applying for a fresh certificate or the renewal of a certificate to practise is an undischarged bankrupt.[7] Except in these two cases the registrar has no power to refuse a certificate to any duly qualified solicitor who is on the roll, who has applied in proper time, and who has complied with all other requirements of section 23 of the Solicitors Act, 1843.[8] In both the above cases if the registrar refuses leave, the solicitor can appeal to the Master of the Rolls, who has the same discretion as the registrar. Neither the registrar nor the Master of the Rolls can give him more than a certificate for the current year. The King's Bench Division has no jurisdiction in

[1] Solicitors Act, 1877 (40 & 41 Vict. c. 25), s. 12.
[2] See *post*, p. 1443.
[3] 54 & 55 Vict. c. 39, s. 43.
[4] 37 & 38 Vict. c. 68, s. 12; 54 & 55 Vict. c. 39, s. 43.
[5] *Kent* v. *Ward* (1896), 70 L. T. 612; *In re Sweeting*, [1898] 1 Ch. 268.
[6] 51 & 52 Vict. c. 65, s. 16.
[7] Solicitors Act, 1906 (6 Edw. VII. c. 24), s. 1.
[8] 6 & 7 Vict. c. 73; *In re A Solicitor*, [1902] 1 K. B. 128, overruling *In re An Application under the Solicitors Act* (1899), 80 L. T. 720.

the matter.[1] But the Court of Appeal has power to make an order restraining a solicitor from applying to the registrar to renew his certificate without the leave of the Court.[2]

Every solicitor who has been duly admitted, whose name is entered on the roll of solicitors and who has taken out his certificate for the current year,[3] is entitled to give advice on all matters of law, to do all kinds of conveyancing business, to act on behalf of a client in any Court—civil, criminal or ecclesiastical—and to charge for such services according to the recognised scale of charges.

But before he can act as a solicitor in any of these Courts, he must be retained by a client. A retainer is an authority given to a solicitor to act on behalf of a client, either generally or in relation to some particular matter. In most cases, a solicitor may be retained either by word of mouth or in writing; but for his own protection he should obtain a written retainer. When he is about to act for a local authority, a retainer under seal is necessary.[4] A special authority should be obtained from the client before the solicitor issues a writ or commences any legal proceeding, though authority may be implied from the subsequent conduct of the client.[5] Any action commenced by a solicitor without authority will be dismissed or stayed, and the solicitor will be ordered to pay the costs of all parties.[6] Similarly, an appearance entered for a defendant without his authority will be struck out with costs against the solicitor.[7] On the other hand, if a writ bearing the name of a solicitor be issued without his authority or consent, all proceedings thereon will be stayed.[8]

The relation of solicitor and client may be determined at any time by the death or lunacy[7] of either; or by the

[1] *In re Chaffers* (1885), 15 Q. B. D. 467.
[2] *In re Whitehead* (1885), 28 Ch. D. 614.
[3] 6 & 7 Vict. c. 73, ss. 27, 31; 40 & 41 Vict. c. 25, s. 17.
[4] See *ante*, p. 1409, and *Hunt* v. *Wimbledon Local Board* (1878), 3 C. P. D. 208; 4 *ib.*, 48; *Newington Local Board* v. *Eldridge* (1879), 12 Ch. D. at p. 360. As to the employment of a solicitor by a trustee in a bankruptcy, see 46 & 47 Vict. c. 52, s. 57; 53 & 54 Vict. c. 71, s. 15 (3).
[5] See *Morgan* v. *Blyth*, [1891] 1 Ch. at p. 355.
[6] *Fricker* v. *Van Grutten*, [1896] 2 Ch. 649; *Geilinger* v. *Gibbs*, [1897] 1 Ch. 479.
[7] *Yonge* v. *Toynbee*, [1910] 1 K. B. 215; *ante*, p. 1378.
[8] Order VII. r. 1.

client withdrawing his retainer; or by the solicitor discharging himself. But when a solicitor is retained to conduct or defend an action in the nature of a common law action, he is, as a rule, bound to carry it on till its termination, for it is an entire contract. But he can cease to act if the client refuses to supply him with the funds necessary for out-of-pocket expenses, or for any other good reason.[1] So long as the relation of solicitor and client exists, all communications passing between them and all communications made by a solicitor in defence of his client's rights or asserting for him any title, which he honestly believes his client to possess, are *primâ facie* privileged although the words employed be defamatory of a third person.[2]

In the High Court of Justice,[3] in the Court of Appeal, in the House of Lords and before the Judicial Committee of the Privy Council a solicitor does not himself conduct his client's case; a barrister must be employed as well as a solicitor. The solicitor prepares the case for trial, and instructs the barrister to conduct the case. But in other courts a solicitor can act as an advocate. He can appear and argue before justices or any magistrate, before a coroner, under-sheriff or secondary, before any revising barrister, and in every County Court, even in revenue matters[4] and before the Income Tax Commissioners.[5] To this there is one exception:—If a solicitor be appointed, as he now may, a justice of the peace for any county, neither he nor any partner of his may practise directly or indirectly before the justices for that county or any borough within the county.[6] A solicitor has, however, no right of audience in the Mayor's Court, London. He can only be heard in the Court of quarter sessions for those counties in which no bar regularly attends, such as Cornwall. Moreover, a solicitor cannot appear in the County Court as advocate for the client of another solicitor. He must be the solicitor "acting generally in the action or matter for such party."[7] All words spoken by a solicitor, when properly acting in Court as an advocate, are absolutely privileged.[8]

[1] See *Underwood* v. *Lewis*, [1894] 2 Q. B. 306.

[2] See *Browne* v. *Dunn* (1893), 6 R. 67; *Baker* v. *Carrick*, [1894] 1 Q. B. 838; *Boxsius* v. *Goblet Frères*, *ib.*, 842; *Campbell* v. *Cochrane* (1906), 1 F. 205 (Ct. of Sess.). Such communications are also privileged from discovery and from production at the trial (see para. 3 of the form of an affidavit of documents, *ante*, p. 1231).

[3] Except in chambers and in some bankruptcy matters; but see *Doxford* v. *Sea Shipping Co.* (1897), 14 Times L. R. 111.

[4] 59 & 60 Vict. c. 28, s. 38.

[5] 61 & 62 Vict. c. 10, s. 16.

[6] 6 Edw. VII. c. 16, s. 3.

[7] *Ex parte Broadhouse* (1867), L. R. 2 Ch. 655; *R.* v. *Judge of County Court of Oxfordshire*, [1894] 2 Q. B. 440.

[8] *Mackay* v. *Ford* (1860), 5 H. & N. 792; *Munster* v. *Lamb* (1883), 11 Q. B. D. 588,

Solicitors have acquired under various statutes a *quasi*-monopoly in all non-litigious legal business. No person who is not a solicitor, duly qualified and enrolled, can act as a solicitor, or sue out any process, or carry on or defend any action.[1] Conveyancing work was formerly done solely by scriveners, but in 1760 the London solicitors broke down this monopoly. Such work, if done for payment, can now only be done by a solicitor.[2] Various statutes also require certain documents and deeds to be attested by a solicitor.[3]

A solicitor has a very extensive authority, especially in litigious matters. Any admission which he makes in the action will bind his client, unless it be made "without prejudice."

He may compromise an action on such terms as he thinks right, unless his client expressly forbids him so to do, so long as the compromise does not include or affect matters outside the action.[4] A client, who induces his solicitor to believe that he has authority to compromise an action upon certain terms, is bound by such compromise if the solicitor in making it reasonably believes that he has authority to do so, although the client did not in fact intend to authorise a compromise upon those terms, and did not understand the terms upon which it was proposed that the compromise should be effected.[5] But a solicitor employed to act for a client in regard to his claim against a third person has, before action brought, no implied authority to effect a compromise.[6] He has, to a like extent, power to refer an action to arbitration;[7] no authority under seal is necessary for this purpose, even though his client be a corporation.[8] So, too, during the progress of an action, service of all notices and communications upon the solicitor

[1] 6 & 7 Vict. c. 73, s. 2; 23 & 24 Vict. c. 127, s. 26; and see 37 & 38 Vict. c. 68, s. 12; Legal Practitioners Act, 1877 (40 & 41 Vict. c. 62), s. 2; Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 43.

[2] 54 & 55 Vict. c. 39, s. 44.

[3] See, for instance, s. 10 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), and rules 7, 46, 55, made under the Land Transfer Acts, 1875 and 1897 (38 & 39 Vict. c. 87; 60 & 61 Vict. c. 65).

[4] *Matthews* v. *Munster* (1887), 20 Q. B. D. 141; *In re West Devon Great Consols* (1888), 38 Ch. D. 51; *Kempshall* v. *Holland* (1895), 14 R. 336; and see *ante*, p. 1266.

[5] *Little* v. *Spreadbury*, [1910] 2 K. B. 658.

[6] *Macaulay* v. *Polley*, [1897] 2 Q. B. 122. A London agent, who has the general conduct of a cause on behalf of a country solicitor, possesses the same general authority as he would in any action in which he was the only solicitor employed; he has, therefore, power to compromise the action in any *bonâ fide* and reasonable manner, unless such general authority has been expressly limited: *In re Newen*, [1903] 1 Ch. 812.

[7] *Smith* v. *Troup* (1849), 7 C. B. 757.

[8] *Faviell* v. *Eastern Counties Ry. Co.* (1848), 2 Exch. 344.

will bind the client. And, generally, the client is bound by and liable for all acts of his solicitor done in the action in the regular course of practice, and without fraud, although contrary to the client's orders.[1] But he is not liable for any wilful trespass committed by his solicitor, or for any act of his which is outside the usual and regular procedure of the Courts. And the solicitor is not liable to third persons for any act done by him in the proper course of procedure under a regular judgment of a Court of competent jurisdiction. But he may render himself liable if he takes upon himself to interfere unduly in the matter, *e.g.*, by giving special directions to the officer of the Court where to levy execution, or if he illegally detains deeds till a claim is satisfied, which his client had no right to make, and in this case he will not escape liability even though he has paid over the money to his client.[2]

At any time during the progress of an action for a debt, the solicitor on the record has authority to receive payment or tender of the debt, and payment or tender to him is equivalent to payment or tender to the plaintiff himself. In other words, the payment to the solicitor discharges the debtor, and if the money be not handed over, the client's only remedy is to sue the solicitor. But payment to a clerk or agent of the plaintiff's solicitor is not, as a rule, a good payment to the plaintiff.

In non-litigious matters the authority of the solicitor is more restricted. It depends largely on the nature of his retainer. Still, on a sale of land by auction, the payment of the deposit to the vendor's solicitor is equivalent to a payment to the vendor.[3] And now, where a solicitor produces a deed which has in its body, or indorsed upon it, a receipt for the consideration-money, and the deed is executed or the indorsed receipt is signed by the person entitled to receive the money, the deed is a sufficient authority for payment to that solicitor.[4] But a solicitor has no implied authority to hand over the deeds in exchange for a cheque,[5] or to alter the bargain

[1] *Latuch* v. *Pasherante* (1696), 1 Salk. 86.
[2] *Oates* v. *Hudson* (1851), 6 Exch. 346.
[3] *Ellis* v. *Goulton*, [1893] 1 Q. B. 350.
[4] Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 56; *King* v. *Smith*, [1900] 2 Ch. 425; and see s. 17 of the Trustee Act, 1893 (56 & 57 Vict. c. 53).
[5] *Papè* v. *Westacott*, [1894] 1 Q. B. 272; *Blumberg* v. *Life, &c., Corporation*, [1897] 1 Ch. 171; [1898] 1 Ch. 27.

which his client has made by consenting to terms to which his client has not agreed, or by waiving terms on which his client insists. The written approval by a solicitor of the form of a draft lease, or conveyance, is not a signature by an agent "thereunto lawfully authorised" sufficient to satisfy the Statute of Frauds.[1] And where a solicitor is employed not to negotiate, but merely to reduce a contract into writing, or to carry it into effect by drafting the proper instruments, notice to him of a fact is not constructive notice to his client.[2]

So far we have dealt with the privileges of a solicitor; but he is also subject to important disabilities. He cannot, as a rule, fix his own price for his labour. The law fixes for him what payment he may receive. The value of each item of his work is either determined by a statutory scale of charges or is liable to be appraised by an officer of the Court. And he cannot recover more from his client than the law thus allows. He cannot insist on being paid as soon as his work is done. He must first deliver to his client a bill of costs—a statement setting out what work he has done in full detail, and stating what amount he charges for each item of his work. And then he must wait a full calendar month after delivery of the bill before he can claim payment by issuing a writ.[3]

Again, a solicitor may not receive from his client, during the existence of a suit, anything beyond his regular charges allowed by law. If a present be made him by a grateful client while the relation of solicitor and client subsists, the Court will presume that the gift was the result of undue influence owing to the fiduciary relation between them; and this presumption continues so long as the relation of solicitor and client continues for other purposes outside the gift.[4]

[1] *Forster* v. *Rowland* (1861), 7 H. & N. 103; *Smith* v. *Webster* (1876), 3 Ch. D. 49.

[2] *Saffron Walden Building Society* v. *Rayner* (1880), 14 Ch. D. 406; and see s. 3 of the Conveyancing Act, 1882 (45 & 46 Vict. c. 39); *Thorne* v. *Heard*, [1895] A. C. 495.

[3] 6 & 7 Vict. c. 73, ss. 37, 48. An important exception is made to this rule by s. 2 of the Legal Practitioners Act, 1875 (38 & 39 Vict. c. 79), which enables any judge of the High Court to authorise a solicitor to commence an action for the recovery of his fees, although one month has not expired since he delivered his bill of costs, if the judge is satisfied that there is probable cause for believing that the client is about to quit England, or to become a bankrupt, or a liquidating or compounding debtor, or to take any other steps, or do any other act, which, in the opinion of the judge, would tend to defeat or delay the solicitor in obtaining payment.

[4] For an extreme instance of the application of this rule, see *Liles* v. *Terry*, [1895] 2 Q. B. 679.

This presumption, however, is not irrebuttable; but the *onus* is on the solicitor to prove clearly that the gift was not influenced by that relation. The application to have the gift declared invalid must be made within a reasonable time after the relation of solicitor and client has ceased to exist. A bequest to a solicitor by will stands upon a different footing from a gift *inter vivos*. Yet even here, if the solicitor himself drew the will by which he benefits, the *onus* lies on him to prove the *bona fides* of the transaction. He must by affirmative evidence remove all suspicion, and satisfy the Court that the testator knew and approved of the contents of the will.[1]

There is no objection to a solicitor openly selling his property to a former client after the relation of solicitor and client is at an end. But if he openly sells to a present client while still acting for him, the sale will be set aside, unless the solicitor can show that he made a full and fair disclosure of every fact affecting the transaction. If, however, the solicitor conceals the fact that he is the vendor and sells to his client through the agency of some trustee or nominee, the transaction is wholly invalid, and will at once be set aside.

A similar rule applies, though with less stringency, to cases in which a solicitor purchases from a client; for, even though the relationship of solicitor and client may now be at an end, the solicitor may have acquired valuable information about his client's property while the relationship existed. If, therefore, the solicitor was ever employed in connection with the property purchased, or on any business which in any way affected that property, the transaction will be set aside if the client subsequently calls it in question, unless the solicitor can satisfy the Court that, during the negotiation for the purchase, he gave his client all reasonable advice against himself which he would have given against a third person. But the purchase will be upheld if the solicitor satisfies the Court that the client was fully informed, that he had competent independent advice, and that the price given was a fair

[1] *Fulton* v. *Andrew and Wilson* (1875), L. R. 7 H. L. 448; *Tyrrell* v. *Painton*, [1894] P. 151.

one.[1] If, however, the solicitor conceals the fact that he is the real purchaser, and purchases in the name of a trustee or agent, the transaction will in every case be set aside.[2] The purchase by a solicitor of the subject-matter of the suit from the client for whom he is acting in that suit is on every ground objectionable.

A solicitor must do his duty to his client. He is bound to bring reasonable skill and learning to the management of his client's affairs. He will not be expected to know the law on doubtful points of rare occurrence, or on such matters as are usually sent to counsel for their opinion. But he should be acquainted with the general rules of law, with the practice of conveyancing, and especially with the practice and procedure of the various Courts, superior and inferior. He must personally apply due diligence and attention to his client's affairs. It is his duty carefully to note his client's instructions, and read the documents which his client lays before him. He must watch the progress of any litigation, inform his client thereof, and be ready to take the proper step at each stage; in particular he must always inform his client of any offer of compromise. In many cases a solicitor will not be allowed to recover certain extra costs, unless he consults his client before incurring them, and warns him that they cannot be recovered from his opponent.[3] He must do all that is necessary to prepare the case for trial; he must procure the necessary evidence, inform the client and his witnesses of the day fixed for the hearing and be in attendance on that day himself, or by some proper person on his behalf, with all necessary witnesses and papers.[4]

He must give his client his personal advice and judgment on all matters both of law and expediency.[5] He must safe-

[1] *Wright* v. *Carter*, [1903] 1 Ch. 27. The law on this point is admirably summed up by Stirling, L. J., in *In re Haslam & Hier-Evans*, [1902] 1 Ch. at pp. 769, 770. As to a mortgage given by a client to his solicitor, see *Cockburn* v. *Edwards* (1881), 18 Ch. D. at p. 455.

[2] *McPherson* v. *Watt* (1877), 3 App. Cas. 254.

[3] *In re Blyth & Fanshawe* (1882), 10 Q. B. D. 207; *In re Broad* (1885), 15 Q. B. D. 420.

[4] Order LXV., r. 5.

[5] He may, of course, leave purely ministerial acts to his clerks.

guard his interests both by securing for him, as far as possible, that to which he is entitled, and also by preventing him from prejudicing his position by giving away his rights or from acting either precipitately or oppressively. If the client is a trustee or an executor, the solicitor must not allow him to commit a breach of trust, or enter into covenants for title, or otherwise render himself personally liable. Every solicitor must always act in the interest of his client, and not put the law in motion for private ends of his own.[1]

He is also bound to manage the business intrusted to him with fidelity and good faith. He must keep his client's secrets, and not disclose any information given him by his client for the purposes of his case, even though unnecessarily. Where it appeared that the same solicitor was employed on both sides in an action at law, the Court set aside the proceedings and ordered the solicitor to pay the costs.[2] But in non-litigious matters the same solicitor is often employed by all parties and may act for all whose interests do not necessarily clash. And, indeed, in the administration of estates and the execution of trusts the same solicitor may often act for all parties even though their interests conflict, and, if proceedings be taken, may instruct separate counsel to represent their different interests. A solicitor must keep clear and accurate accounts of all moneys received by him for and on behalf of his client. He should keep such moneys apart from his own. He is liable at any moment to be called on to render an account. He must keep clear and accurate accounts of his own charges against his client, and of the work for which each item is charged. He should also keep for reference a copy of every letter which he writes on his client's behalf.[3]

But a solicitor is not merely a professional man retained by a client. He is also an officer of the Court, and as such owes duties to the Court, of which a few instances only can be given here. He must never be guilty of "sharp practice";

[1] *Harbin* v. *Masterman*, [1896] 1 Ch. 351.
[2] *Berry* v. *Jenkins* (1826), 11 Moo. 308; *R.* v. *Alderson* (1839), 11 A. & E. 3.
[3] *Boxsius* v. *Goblet Frères*, [1894] 1 Q. B. at p. 845.

he must never "snap" a judgment; he must not allow his client to "swear by the card"; he must never attempt to mislead the Court himself, nor allow his client so to do.[1] He must never permit any unqualified person to practise in his name.[2]

No solicitor may commence any legal proceeding without instructions from his client. Every solicitor whose name is indorsed on any writ of summons is bound to state on demand whether such writ was issued with his authority or not.[3] A solicitor who has issued a writ in the name of a firm must, on demand, declare in writing the names and places of residence of all the persons constituting that firm.[4]

Every solicitor who has accepted service of a writ must appear thereto in due course in accordance with his undertaking, or he will be liable to be attached.[5] And, generally, every solicitor must loyally fulfil every undertaking which he has given in his character as an officer of the Court, whether to his client or to a third person, and promptly pay all moneys due from him in that character, or he will be liable to be committed.[6]

The solicitor on the record is personally liable for the court fees and the jury fees,[7] and for the fees payable to an official referee.[8] But he is not liable to the sheriff for his fees or possession money;[9] nor is he liable to the witnesses for their expenses,[10] unless he has done some act to bring upon himself such additional liability.

Solicitors frequently enter into partnership. Only qualified solicitors can carry on legal business in partnership. Any agreement or arrangement, which is in fact a partnership between a solicitor and an unqualified person, is illegal; and the solicitor may be struck off the roll, and the unqualified person may be prosecuted under section 32 of the Solicitors Act, 1843.[11]

The death of a partner immediately puts an end to any existing partnership. And a dissolution, caused thus or in any other way, at once puts an end to all retainers, as every

[1] *Pierce* v. *Blake* (1696), 2 Salk. 515; *In re Dangar's Trusts* (1889), 41 Ch. D. 178; *In re Davies* (1898), 14 Times L. R. 332.
[2] 6 & 7 Vict. c. 73, s. 32.
[3] Order VII., r. 1.
[4] Order XLVIII.A., r. 2; *Abrahams* v. *Dunlop Pneumatic Tyre Co.*, [1905] 1 K. B. 46.
[5] Order XII., r. 18; *In re Kerly*, [1901] 1 Ch. 467.
[6] *Swyny* v. *Harland*, [1894] 1 Q. B. 707; *In re A Solicitor*, [1895] 2 Ch. 66; *In re Coolgardie Goldfields, Ltd.*, [1900] 1 Ch. 475; *D.* v. *A. & Co.*, *ib.*, 484; *In re A Solicitor*, [1907] 2 K. B. 539.
[7] *Langridge* v. *Lynch* (1876), 34 L. T. 695.
[8] Order XXXVI., r. 55D.
[9] *Royle* v. *Busby & Son* (1880), 6 Q. B. D. 171.
[10] *Robins* v. *Bridge* (1837), 3 M. & W. 114.
[11] 6 & 7 Vict. c. 73.

client is in theory entitled to the services of each individual member of the firm.[1] The partnership deed usually disposes of the "goodwill" on the dissolution of a firm of solicitors and provides for the apportionment among its members of the clients of the old firm with their papers. But such an arrangement is, of course, not binding on the clients, who are free to consult and retain whomsoever they choose, whether a member of the former firm or not. In fact, "the term 'goodwill' seems wholly inapplicable to the business of a solicitor, which has no local existence, but is entirely personal, depending upon the trust and confidence which persons may repose in his integrity and ability to conduct their legal affairs."[2]

The liability of one partner for the act or default of another during the partnership is very extensive. A solicitor is, of course, liable for every act or default of his partner of which he has knowledge, and to which he consents. But he is also liable for every act or default done or committed by his partner within the scope of the ordinary business of the firm, although he had no notice of it; for each partner is the agent of the other with regard to all matters within that scope.[3]

Thus, one member of a firm of solicitors has no implied authority to bind his partner by a promissory note in the name of the firm, though given for their debt; or by a post-dated cheque; or by drawing or indorsing a bill of exchange; or by a guarantee. So one partner is not liable for money borrowed without his knowledge by another, even though borrowed in the name of the firm.[4]

If a solicitor receives money from a client to be invested on mortgage, either ministerially to complete an advance which the client has already agreed to make on a certain security, or to find securities which he is to submit to his client, who, if he approves of them, will then invest his money thereon, his partner will be liable for any misappropriation of the money.[5] But if he receives his client's money to hold it till he can find a proper security, and then to invest it for his client thereon, he is employed to do the work of a scrivener, rather than a solicitor, and his innocent partner will therefore not be liable.[6]

[1] *Rawlinson* v. *Moss* (1861), 30 L. J. Ch. 797.
[2] *Per* Lord Chelmsford, L. C., in *Austen* v. *Boys* (1858), 27 L. J. Ch. at p. 718.
[3] *Blyth* v. *Fladgate*, [1891] 1 Ch. 337. The liability of an innocent solicitor for a debt or liability incurred through any fraud or breach of trust committed by his partner is now discharged by his bankruptcy: 46 & 47 Vict. c. 52, s. 30 (1).
[4] *Plumer* v. *Gregory* (1874), L. R. 18 Eq. 621.
[5] See *Dowby* v. *Watson* (1888), 39 Ch. D. 178; *Stokes* v. *Prance*, [1898] 1 Ch. 212.
[6] *Harman* v. *Johnson* (1853), 2 E. & B. 61.

Again, as it is part of the ordinary business of a firm of solicitors that has the conduct of a sale by the Court to pay the deposits into Court for the auctioneer, if one member of such a firm receives a deposit from the auctioneer and misappropriates it, his partners are liable.[1] But it is not part of the ordinary business of a solicitor to receive purchase-money belonging to his client, or the repayment of mortgage-money; and one partner is therefore not liable for the misapplication of money so received by his partner without his knowledge.[2] For the same reason, if a solicitor receives on deposit to hold for his client bonds payable to bearer, his partner, in the absence of clear notice of such deposit, will not be responsible for their safe custody.[3]

The country solicitor is alone answerable to the client, the London agent is answerable only to the country solicitor, for any negligence or misconduct.[4] The London agent owes no direct duty to the lay client, whose only remedy, therefore (at all events in the absence of fraud), is against the country solicitor.[5] There is no privity between the client and the London agent; hence the client cannot sue the agent for money received to his use,[6] or on any other implied contract. The country solicitor is, in fact, the client of the London agent; the lay client is the client of the country solicitor alone.

If a solicitor be guilty of a breach of his duty to his client, the client has different remedies according to the circumstances:—

(i.) He may sue the solicitor for damages for negligence, or for money had and received to the use of the plaintiff, or for the delivery up of papers, or for an account. A solicitor is liable to his client for damages arising from his own negligence in the course of his employment, or from the negligence of his clerk, his partner, or his London agent, provided they were acting within the limits of the authority conferred on them by him. It does not matter whether the solicitor was to be paid for his services or not; it is immaterial whether he was or was not certificated at the time he was employed.[7]

(ii.) The client may refuse to pay the whole or part of his solicitor's bill of costs.

[1] *Biggs* v. *Bree* (1882), 51 L. J. Ch. 363.
[2] *Bourdillon* v. *Roche* (1858), 27 L. J. Ch. 681; *Sims* v. *Brutton* (1850), 5 Exch. 802.
[3] *Cleather* v. *Twisden* (1883), 24 Ch. D. 731; (1884), 28 Ch. D. 340; *Rhodes* v. *Moules*, [1895] 1 Ch. 236; and see *Mara* v. *Browne*, [1896] 1 Ch. 199; and *Marsh* v. *Joseph*, [1897] 1 Ch. 213.
[4] *In re Farman* (1897), 14 Times L. R. 20; and see *In re Wilde*, [1910] 1 Ch. 100.
[5] *Simmons* v. *Rose* (1862), 31 Beav. 1.
[6] *Collins* v. *Brook* (1860), 29 L. J. Ex. 255.
[7] *Brown* v. *Tolley* (1874), 31 L. T. 485.

(iii.) He may, in very grave cases, take criminal proceedings against the solicitor. Thus, a solicitor may be indicted for embezzling money or securities intrusted to him for safe custody, or with a written direction as to its application.[1]

(iv.) He may apply to the Court for a summary order to compel the solicitor to do his duty. It is by a similar motion that a solicitor is called in question for a breach of his duty to the Court.[2]

(v.) He may apply to strike the name of the solicitor off the roll, or to make him answer the matters contained in an affidavit.

The Court has power either to strike a solicitor off the roll or to suspend him from practice for such period as it may think fit. This power will, as a rule, only be exercised where the solicitor has been guilty of grave professional misconduct, or of a crime, or of some act so dishonest as to render him unfit to continue to be an officer of the Court.[3] Thus, a solicitor will be struck off the roll if he has been guilty of an offence against section 32 of the Solicitors Act, 1843,[4] or has put before the Court an affidavit which he knows to be false, or has fraudulently appropriated moneys due to his client or of which he was a trustee. In 1905 a solicitor who had become a bookmaker was struck off the roll.[5] In many cases the first step towards striking a solicitor off the roll is to call on him to answer the allegations contained in a certain affidavit.

The procedure is regulated by sections 12—15 of the Solicitors Act, 1888.[6] The application, whether at the instance of the solicitor himself or of any other person, is now made to a committee which consists of not less than three nor more than seven members of the council of the Law Society, selected for the purpose by the Master of the Rolls. The application will be heard by not less than three members of the committee. The committee is a

[1] 24 & 25 Vict. c. 96, ss. 3, 75—77, and 1 Edw. VII. c. 10; *R.* v. *Cooper* (1874), L. R. 2 C. C. R. 123; *R.* v. *Fullagar* (1879), 14 Cox, 370; *R.* v. *Newman* (1882), 8 Q. B. D. 706; and *In re Bellencontre*, [1891] 2 Q. B. 122.

[2] See *ante*, pp. 1172, 1173; and *Seldon* v. *Wilde*, [1910] 2 K. B. 9; *United Mining, &c., Corporation* v. *Becher*, [1910] 2 K. B. 296.

[3] *In re Weare*, [1893] 2 Q. B. 439.

[4] *In re Kelly*, [1895] 1 Q. B. 180.

[5] *In re A Solicitor* (1905), 93 L. T. 838.

[6] 51 & 52 Vict. c. 65.

Court; it can administer an oath; its proceedings are judicial, and are therefore absolutely privileged.[1]

An application to the committee to strike a solicitor off the roll, or to require him to answer an affidavit, must be in writing signed by the applicant, whose address and occupation must be stated. He must also make or join in an affidavit, stating concisely, and with all material dates, the matters of fact on which he relies in support of his application. He may attach a copy of any material correspondence as an exhibit to his affidavit. The applicant is not necessarily the client of the solicitor; any person aggrieved, or anyone having official cognisance of the matter (such as, for instance, an official receiver, or even the Law Society itself), may apply to the committee. When an application against a solicitor has once been lodged, it cannot, under any circumstances, be withdrawn without the leave of the committee.

If the case made by the affidavit appear to the committee to require an answer from the solicitor, they appoint a day for hearing the application. A copy of the application and of the affidavit, together with notice of the day fixed for the hearing, is sent by the registrar to the solicitor at his last known place of abode or business. Notice of the day fixed is also sent to the applicant. If the case made by the affidavit does not appear to the committee to call for an answer from the solicitor, the applicant is so informed. If dissatisfied with the decision, he can renew his application to the committee upon additional evidence.

At the hearing either party may appear in person or by counsel or solicitor. The committee may proceed in the absence of either party, if they are of opinion that such absence is the result of gross negligence or of an intention to avoid or delay proceedings. If the solicitor does not appear at the hearing and the committee determine to proceed in his absence, and in any other case with the consent in writing of the solicitor, the committee may receive and act upon evidence given by affidavit, including the affidavit or affidavits upon which the application is made. In all other cases the evidence is given orally, and either on oath or affirmation. The chairman administers the oath, and the witnesses are examined and cross-examined, and the whole hearing is conducted, so far as possible, like an ordinary action at *nisi prius*. The committee may at any moment stop the proceedings on the ground that no *primâ facie* case of professional misconduct has been made out by the affidavit or evidence which calls for an answer.[2]

At the close of the inquiry the committee embody their finding in a report, which is signed by its chairman, and is then filed in the Central Office of the High Court with the affidavit of the applicant. A copy of the report is sent to both the applicant and the solicitor. If it is favourable to the solicitor, the duties of the committee are at an end; it need not take any further proceeding.[2] But the applicant, if still dissatisfied, may bring the report before the Court, and apply for an order striking the solicitor off the

[1] *Lilley* v. *Roney* (1892), 61 L. J. Q. B. 727.
[2] *R.* v. *Incorporated Law Society*, [1896] 1 Q. B. 327.

roll, or requiring him to answer the allegations contained in the affidavit, although the committee is of opinion that there is no *primâ facie* case of misconduct against the solicitor. The applicant on such a motion cannot be heard in person, but must appear by counsel.[1]

If, however, the finding of the committee is adverse to the solicitor, the report will be set down by the society for consideration by the Court. Notice is sent to the parties of the day for which it is entered, and counsel will be instructed to appear on behalf of the Law Society. The applicant is also entitled to attend or be represented; and so, of course, is the solicitor. The report of the committee has the same effect, and will be treated by the Court in the same manner, as a report of a Master of the Court. It is by no means conclusive; the Court may make such order thereon as it sees fit. Thus, where the committee had reported that though the conduct of a solicitor was extremely reprehensible, they did not find him guilty of professional misconduct, the Divisional Court and the Court of Appeal took a graver view of the solicitor's conduct, and suspended him for two years.[2] If on consideration of the report the Court makes an order adverse to the solicitor, the registrar must make such entry on, or alteration in, the roll of solicitors as is involved in the order. In some cases, even though the solicitor be not struck off the roll, an order will be made that he bring a sum of money into Court, and that he pay all the costs of the application.

An order striking a solicitor off the roll is not made in a "criminal cause or matter" within the meaning of section 47 of the Judicature Act, 1873; hence the Court of Appeal has jurisdiction to hear an appeal by the solicitor against such an order.[3]

In Ecclesiastical Courts, the place of solicitors is taken by proctors. Formerly they were a distinct profession, and were admitted to practise by the Dean of Arches after serving an apprenticeship of seven years' duration. By the Attorneys' and Solicitors' Acts, 1870 and 1877,[4] solicitors were permitted to act as proctors in all Ecclesiastical Courts, and proctors are not now a separate profession.

### (iii.) *Notaries Public.*

A notary public is a person who attests deeds or writings in order that they may be received as authentic in foreign

[1] *In re A Solicitor*, [1903] 2 K. B. 205.
[2] *In re Davies* (1898), 14 Times L. R. 332.
[3] *In re Eede* (1890), 25 Q. B. D. 228; *In re Davies*, *suprà*. A solicitor may be struck off the roll at his own request, *e.g.*, if he wishes to be called to the Bar, *ante*, p. 1427.
[4] 33 & 34 Vict. c. 28, s. 20; 40 & 41 Vict. c. 25, s. 17.

countries. He also authenticates and certifies copies of documents for use abroad. At the request of the holder he will note and protest a bill of exchange the acceptance or payment of which has been refused. He may also prepare wills, contracts and other documents, although this class of work is more frequently performed by solicitors. Notaries are appointed by the Archbishop of Canterbury through the Master of the Court of Faculties.[1] In the provinces they must be solicitors or have been apprenticed to a notary for five years. In the City of London they must have been so apprenticed and also be freemen of the Scriveners' Company.

[1] See *Hudson* v. *Boutflower*, [1910] W. N. 228.

## Chapter IX.

### THE PRESENT CONDITION OF THE LAW OF ENGLAND.

We have now concluded our survey of the common law of England. We have endeavoured to state its leading principles in clear and simple language, which will be intelligible, not merely to the legal practitioner and law student, but also to a layman. This work is not intended exclusively for those who are or soon will be members of the legal profession. The laws of this country are not the exclusive property of any special class of the community; they are not the perquisite of any particular profession; they are the heritage of the nation as a whole. Therefore the nation should take a pride in its property, and make some effort to understand its value.

And in former days it did so. In Saxon times the doomsmen were judges of law as well as of fact. The Norman barons knew their exact rights, and refused to change the laws of England at the bidding of clerical canonists.[1] Falkland and Hampden knew the laws of their country and fought for them sturdily and well. During the sixteenth and seventeenth centuries some years' study at an Inn of Court was the natural finish to a liberal education. But that is not so now. Our laity seem to have abandoned any attempt to comprehend even the outline of the system by which they are governed, or rather by which they are supposed to govern themselves. Our law is often to them a matter of entire indifference.

This is much to be regretted, though the cause is not far to seek. The law of England is worth studying. It embodies the traditions and instincts of a noble people that has ever sturdily maintained its rights. The genius of the

[1] *Nolunt leges Angliae mutare quae usitatae sunt et approbatae*: Statute of Merton, 1235 (20 Hen. III. c. 9).

English race, its manners and customs and modes of thought, the growth of its civilisation as well as the development of its constitution, are best learnt from its litigation and its legislation. Our law is not a thing of to-day; it is not the product of one period; it has broadened slowly down from precedent to precedent. The trained intellects of a long series of most capable judges, lawyers and legislators have been for centuries busy in its amendment. It is a thing of native growth, not a ready-made importation, nor a Code Napoléon suddenly imposed by an Emperor on his people. And yet, while still retaining what was valuable in the former law, it has never been unduly reluctant to accept suggested improvements from any source. It has assimilated what was best in Roman law, in Teutonic custom, and in the maritime laws of Oléron and of Rhodes. We can trace in it the gradual interweaving of the Saxon law with the feudal system which the Conqueror introduced; we see how both these subsequently were modified by the rise of commerce. Our law is full of human interest: it is a living and a growing thing, which has spread and grown, and still will spread and grow, with the social development of the people. The law of England is worth knowing for itself alone.

Again, the study of the law is of great value as an educational factor. It tends to train and develop the mind, and to quicken and enlarge its powers. It requires an intellect of no mean order to grasp the rules and fundamental notions of our jurisprudence, to distinguish true from false analogies, to draw correct inferences from evidence, and to reason justly and readily on questions which are not concluded by authority, or on which the reported decisions of our judges appear to clash. Moreover, from the law—if properly taught—the student learns an invaluable lesson: how to "sift facts"; that is, in the first place, to reject much unnecessary recrimination, and narrow down the dispute to the real question which has raised the controversy between the parties; and next, to disentangle from a crowd of irrelevant details the facts that are material to the question in issue. Then comes

a further mental process, equally valuable, equally difficult to learn elsewhere—namely, the application to these material facts of the appropriate rule or principle which guides us to the right conclusion. These lessons will be useful in every scientific study, and in every problem of a busy life.

And if we descend to more utilitarian considerations, it is surely the interest, as well as the duty, of every English citizen to understand the law by which England is governed. That law is not only a most interesting product of the human mind; it has at the same time a direct practical bearing on our health and wealth, on our means of livelihood and our personal happiness. It regulates all our social concerns. How can a man adequately and intelligently discharge his various duties as a citizen, how can he share in local government or take his part in the administration of justice, without some knowledge of the law—in its principles, if not in its practice? Each one of us is liable to be called as a witness, or to serve on a jury, or to be made a guardian of the poor; each one of us may be made an executor or a trustee, or, worse still, a defendant in a lawsuit; each one of us must ultimately become either a testator or an intestate. Is it not wise to prepare ourselves for these various calamities? Is it too much to say that some knowledge of the law is the best introduction to the living business that goes on around us, the best preparation for the actual affairs of life? In all the infinite variety of human concerns, law has a finger. The progress and well-being of a nation depend largely on its legal system.

But before we can expect laymen to approach the study of the law, it must be given a better form and a clearer expression. That is also what both students and practitioners need most. The substance of the law of England is not in all respects perfect; each of us, no doubt, thinks that he could improve it in certain particulars, though others would probably differ from him as to those very matters and prefer the law as it stands. Such amendments should be made, if at all, with caution and deliberation, and after careful inquiry as to

what the law on the point really is; for our present law is far more just and far more sensible than most people imagine. The law of England—when once we can find out what it is—is the best and noblest system which this world has ever seen. But it is sadly defective in its arrangement and the manner of its expression. The great advantage—perhaps the only advantage—which the Roman law possesses over ours is that Justinian had the sense to commission an eminent jurist to write an elementary institutional work, which should be an outline and an introduction to the whole law. And further, he had the sense to have this institutional work passed into what was equivalent to an Act of Parliament, without allowing any layman to tinker at it.

It is essential to the welfare of the community that in every State there should exist an authoritative body of law, readily accessible, easily intelligible, and strictly and impartially enforced. That our law is strictly and impartially enforced, no one will deny; in its substance it is as logical and as enlightened as any body of law which has ever existed on this earth. But it is not easily intelligible, by laymen at all events; and it is not readily accessible either to laymen or to lawyers.

Why is this? Why is our law so devoid of scientific arrangement? Why is it so difficult to find an exact and authoritative pronouncement of what we all know is the law?

There are many possible answers to these questions. But perhaps the chief reason for this sad lack of form is that our law has come to us from so many and from such different sources. The law of England is largely derived from antecedent custom. In the thirteenth century legal writers incorporated in their text-books large portions of the Roman law, and declared that these were also the law of England. As civilisation advanced, our judges endeavoured to mitigate the rigour and the technicality of the common law by means of legal fictions. Subsequently the same object was attained in part by the instrumentality of a separate Court of Equity.

The judges, moreover, came to regard the decisions of their predecessors as precedents, which they were bound to follow in similar cases; and in following they often extended them. But now changes in the law of England are made almost entirely by statute.

And what is the result?

There are nearly 2,000 text-books more or less in constant use by lawyers; and one must consult the last edition, for it is unsafe to rely on an edition of a text-book six years old. There are now in the library of the Middle Temple more than 2,000 volumes of reports of English cases alone; and in any one of these may lurk a decision or a *dictum* which may be cited in court on the argument of a point of law. But worse than this is the unnecessary number of hastily-drafted and ill-considered statutes which throw the law into confusion. Every year adds some fifty enactments to the Statute Book—enactments often passed in the dead of the night by men who, as a rule, are ignorant of law. Many of these statutes are passed without any serious attempt to master the law already existing on the subject. Very few of those who vote for a measure have realised the precise effect and meaning of the enactment which they are helping to carry into law. Legislation is the only trade which requires no apprenticeship. For three centuries after Parliaments began to assemble there was very little legislation; now there is too much.

Hence ignorance of law is very excusable in the present day. How can we expect any layman to study our law, so long as it remains in its present unscientific and unattractive shape? Can he wade through thousands of statutes, or through tens of thousands of reported decisions? Who shall warn him which statute is obsolete, which decision overruled? Who shall guide him to the proper text-book to suit an amateur? Shall he for pleasure undertake the toil of Leolin,

> Mastering the lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances,
> Through which a few, by wit or fortune led,
> May beat a pathway out to wealth and fame?

Is not this description almost as true now as when Alfred Tennyson wrote it in 1865? The truth is that the present condition of our law is a bar to any real study of it by a layman. It is not the substance of the law, but the way in which it is presented to the non-professional man, which leads him to despise and sometimes even to abuse it.

And yet the State insists that ignorance of the law affords no excuse for any breach of it. The prisoner in the dock, the defendant in a lawsuit, is not allowed to urge in his defence that he did not know that he was breaking the law. One would have thought that this fact alone would be regarded as imposing on the State the duty of expressing its commands in clear and unmistakable language and of rendering them widely known. But, if so, this is a duty which at present the State wholly ignores. It makes no attempt to teach the law to the people.

And it is not only the non-professional man who suffers. The task of any student who intends to practise the profession of the law is enormously increased by its unwieldy bulk and want of form. But it is to the lawyers themselves that the condition of our law is especially detrimental. Every year it becomes more and more difficult for any solicitor or barrister in active practice to retain familiarity with more than some special branch or portion of the law. Any comprehensive study of the law of England as one compact and organised whole is at present impossible to the busy practitioner. And this renders it so difficult for him to discover and apply those broad common-sense principles which underlie our English law. A real grasp of the primary principles which pervade the whole field of law is rarely attained by a man who has thoroughly mastered only a portion of the subject. Until the law is reduced to a better form and order, our study of it necessarily must be fragmentary and probably will be unscientific: our analysis and definition of legal ideas will be neither accurate nor precise.

How is our law to be reduced into better form and order? We cannot go on much longer as we are doing now. Surely

the proper remedy is a Code. It is said, no doubt, that codification will render our law rigid and inelastic; but this is not the case. It is easier to amend a statute than to alter the unwritten law; for the unwritten law rests in the bosom of the judges; the statute law is "broad-based upon the people's will." Sooner or later the law of England must be codified. To do this would cost the nation not one-twentieth part of the price of a single Dreadnought. And it would be well worth the money. Everyone admits the value of such measures as the Bills of Exchange Act, 1882, the Partnership Act, 1890, and the Sale of Goods Act, 1893. Moreover, great strides have been made in this direction during the last five years, as witness the Marine Insurance Act, 1906, the Patents and Designs Act, 1907, the Post Office Act, 1908, the Agricultural Holdings Act, 1908, the Children Act, 1908, the Companies (Consolidation) Act, 1908, the Assurance Companies Act, 1909, and the Licensing (Consolidation) Act, 1910. But there should be a systematic and organised attempt to produce a series of such Digests, covering the whole ground and arranged in some scientific order. The Acts relating to each topic should be all repealed and then re-enacted in one compendious and well-arranged statute. Such statutes would be in fact instalments of the future Code.

And then when lucid expression and scientific arrangement are given to our legal system, when our law is made clear and intelligible and readily accessible to all, when at last its lack of form and defects of expression are removed, then we trust English men and women will know and understand its principles, and will recognise and admit that the law of England is logical, sensible and just.

FINIS.

# APPENDIX OF INDICTMENTS.

1. *Arson.*

County of Southampton, to wit. } The jurors for our Lord the King upon their oath present that James Black on the fourth day of April in the year of Our Lord one thousand nine hundred and six feloniously, unlawfully and maliciously did set fire to a certain warehouse, situate in the parish of Odiham in the county of Southampton, with intent thereby to defraud a certain insurance company called the English and Foreign Insurance Company; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

2. *Assault and Battery at Common Law.*

County of Devon, to wit. } The jurors for our Lord the King upon their oath present that Arthur Smith on the first day of May in the year of Our Lord one thousand nine hundred and nine in and upon one Cecil Dixon unlawfully did make an assault, and him the said Cecil Dixon did then beat, wound and illtreat and other wrongs to the said Cecil Dixon then did to the great damage of the said Cecil Dixon; against the peace of our Lord the King, his Crown and dignity.

3. *Bigamy.*

Central Criminal Court, to wit. } The jurors for our Lord the King upon their oath present that John Brown on the first day of June in the year of Our Lord one thousand nine hundred and five at the parish of Marylebone in the county of London did marry and take to wife one Jane Smith and that the said John Brown afterwards and whilst he was so married as aforesaid, and during the life of the said Jane his former wife to wit, on the fourth day of May in the year of Our Lord one thousand nine hundred and nine, at the parish of Lambeth in the county of London feloniously did marry and take to wife one Kitty Jones; against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his Crown and dignity.

4. *Burglary after a Previous Conviction.*

Borough of Plymouth, to wit. } The jurors for our Lord the King upon their oath present that Joseph Archibald upon the tenth day of June in the year of Our Lord one thousand nine hundred and eight about the hour of two in the night of the same day the dwelling-house of one Charlotte Martin situate in Hyde Park Road in the parish and borough of Plymouth feloniously and burglariously did break and enter with intent the goods and chattels of the said Charlotte Martin in the said dwelling-house then being feloniously to steal take and carry away; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

*Second Count.*—And the jurors aforesaid upon their oath aforesaid do further present that, before the commission of the offence in the first count of this indictment charged and stated, the said Joseph Archibald at the Assizes and General Session of Oyer and Terminer and General Delivery of the Gaol of our Lord the King holden at Cardiff in and for the county of Glamorgan on the eighteenth day of March in the year of Our Lord one thousand nine hundred and three was then and there convicted of felony by the name of Joseph Scott which said conviction is still in full force strength and effect and not in the least reversed, annulled or made void.

*Third Count.*—And the jurors aforesaid upon their oath aforesaid do further present that the said Joseph Archibald is an habitual criminal; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

5. *Burglary, Larceny and Receiving.*

Central Criminal Court, to wit. } The jurors for our Lord the King upon their oath present that Thomas Jenkins on the first day of June in the year of Our Lord one thousand nine hundred and nine about the hour of ten in the night of the same day at the parish of Lambeth in the county of London, the dwelling-house of Eric Vavasour Hill there situate feloniously and burglariously did break and enter with intent to commit felony therein, to wit, with intent the goods, chattels and moneys in the same dwelling-house then and there being feloniously and burglariously to steal, take and carry away, and then and there eleven silver spoons, &c., &c., of the goods and chattels of the said Eric Vavasour Hill in the same dwelling-house then and there being found then and there in the same dwelling-house feloniously and burglariously did steal, take and carry away; against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his Crown and dignity.

*Second Count.*—And the jurors aforesaid upon their oath aforesaid do further present that before and at the time of the committing of the offence by the said Thomas Jenkins in this count mentioned, the goods

and chattels in the said first count mentioned had been feloniously stolen, taken and carried away; and that the said Thomas Jenkins afterwards, to wit, on the same day and in the year aforesaid at the parish aforesaid in the county aforesaid, the same goods and chattels then being the goods and chattels of the said Eric Vavasour Hill as in that count also mentioned feloniously did receive and have, he the said Thomas Jenkins at the time he so received and had the same goods and chattels then and there well knowing the same to have been feloniously stolen, taken and carried away as in this count before mentioned; against the form of the statute in such case made and provided, and against the peace of our said Lord the King, his Crown and dignity.

6. *Conspiracy to Defraud.*[1]

Central Criminal Court, to wit. } The jurors for our Lord the King upon their oath present that William Evans and Charles Dixon on the first day of December in the year of Our Lord one thousand nine hundred and seven unlawfully did conspire, combine, confederate and agree together and with divers other persons, whose names to the jurors aforesaid are unknown, by divers false pretences and by divers artful and subtle ways, means, stratagems and devices unlawfully and fraudulently to obtain and acquire to themselves of and from one Algernon Blundell divers of the monies of him the said Algernon Blundell and to cheat and defraud him of the same; against the peace of our Lord the King, his Crown and dignity.

7. *Embezzlement.*

Borough of Plymouth, to wit. } The jurors for our Lord the King upon their oath present that Sidney Herbert on the first day of August in the year of Our Lord one thousand nine hundred and six being then employed as clerk to Batten Carne and Carne's Banking Company Limited did then and whilst he was so employed as aforesaid receive and take into his possession certain money to a large amount, to wit, to the amount of four hundred pounds for and in the name and on the account of the said Batten Carne and Carne's Banking Company Limited his employers, and the said money then fraudulently and feloniously did embezzle; and the jurors aforesaid upon their oath aforesaid do say that the said Sidney Herbert then in manner and form aforesaid the said money the property of the said Batten Carne and Carne's Banking Company Limited his said employers from the said Batten Carne and Carne's Banking Company Limited his said employers feloniously did steal take and carry away; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

*Second Count.*—And the jurors aforesaid upon their oath aforesaid do further present that the said Sidney Herbert on the first day of August in the year of Our Lord one thousand nine hundred and six being then

[1] The overt acts may be set out in the indictment, if desired, as in the case of treason (Indictment No. 21), but this is not essential.

employed as servant to Batten Carne and Carne's Banking Company Limited did then and whilst he was so employed as aforesaid receive and take into his possession certain money to a large amount, to wit, to the amount of four hundred pounds for and in the name and on the account of the said Batten Carne and Carne's Banking Company Limited his masters and the said money then fraudulently and feloniously did embezzle; and so the jurors aforesaid upon their oath aforesaid, do say that the said Sidney Herbert then in manner and form aforesaid, the said money, the property of the said Batten Carne and Carne's Banking Company Limited his said masters, from the said Batten Carne and Carne's Banking Company Limited his said masters feloniously did steal take and carry away; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

*Third Count.*—And the jurors aforesaid upon their oath aforesaid do further present that the said Sidney Herbert afterwards and within six calendar months from and after the time of the committing of the offence in the first count of this indictment charged and stated, to wit, on the first day of August in the year aforesaid being then employed as clerk to the said Batten Carne and Carne's Banking Company Limited did then and whilst he was so employed as last aforesaid receive and take into his possession certain other money to a large amount, to wit, to the amount of five hundred pounds for and in the name and on the account of the said Batten Carne and Carne's Banking Company Limited his said employers, and the said last mentioned money then and within the said six calendar months fraudulently and feloniously did embezzle and so the jurors aforesaid upon their oath aforesaid do say that the said Sidney Herbert then and in manner and form aforesaid the said money the property of Batten Carne and Carne's Banking Company Limited his said employers, from the said Batten Carne and Carne's Banking Company Limited his said employers feloniously did steal take and carry away; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

*Fourth Count.*—And the jurors aforesaid upon their oath aforesaid do further present that . . . [Here charge the last offence as committed by the prisoner in the capacity of a servant to the prosecutors. Another offence, if committed within six months of the one charged in the first count, could be added to the indictment.]

8. *False Pretences* (*with a count under s.* 13 *of the Debtors Act,* 1869).

City of Winchester, to wit. } The jurors for our Lord the King upon their oath present that William Pritchard on the twelfth and thirteenth days of January, in the year of Our Lord one thousand nine hundred and two unlawfully knowingly and designedly did falsely pretend to one George Cole, of the "Bear Inn," East Street, in the said city, that he had brought over from Toronto, and was possessed of, five hundred head of cattle, and that he had four hundred pounds standing to his credit at the Winchester Branch of the National

Provincial Bank of England in the said city ; by means of which said false pretences the said William Pritchard did then unlawfully obtain from the said George Cole food of the value of seven shillings, to wit (*specify the details*), the property of the said George Cole, with intent to defraud : whereas in truth and in fact he, the said William Pritchard, was not then possessed of five hundred head of cattle brought from Toronto, or any other cattle, and had not then four hundred pounds, or any other sum, standing to his credit at the Winchester Branch of the National Provincial Bank of England or anywhere else, as he, the said William Pritchard, then well knew when he did so falsely pretend as aforesaid ; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

*Second Count.*—And the jurors aforesaid, upon their oath aforesaid, do further present that the said William Pritchard, being an evil-disposed person and intending to cheat and defraud, on the twelfth day of January in the year of Our Lord one thousand nine hundred and two did request the said George Cole to supply him, the said William Pritchard, with certain food, lodging and accommodation on credit ; and then on the same day in the year aforesaid unlawfully knowingly and designedly did falsely pretend to the said George Cole that he was possessed of five hundred head of cattle brought from Toronto, and that he had four hundred pounds standing to his credit at the Winchester Branch of the National Provincial Bank of England in the said city ; by means of which said false pretences he, the said William Pritchard, did then and on the following day unlawfully and fraudulently obtain on credit of and from the said George Cole food, lodging and accommodation of the value of twelve shillings, and incur a debt of twelve shillings to the said George Cole, and obtain credit to the extent of twelve shillings from the said George Cole in respect of such food, lodging and accommodation : whereas in truth and in fact he, the said William Pritchard, was not then possessed of five hundred head of cattle brought from Toronto, or any other cattle, and had not then four hundred pounds, or any other sum, standing to his credit at the Winchester Branch of the National Provincial Bank of England or anywhere else, as he, the said William Pritchard, then well knew when he did so falsely pretend as aforesaid. And so the jurors aforesaid, on their oath aforesaid, do say that the said William Pritchard, in incurring such debt and liability to the said George Cole as in this count aforesaid, did obtain credit under false pretences and by means of fraud ; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

### 9. *Forging and Uttering.*

Central Criminal Court, to wit. } The jurors for our Lord the King upon their oath present that Henry Thompson upon the sixth day of April in the year of Our Lord one thousand nine hundred and eight feloniously did forge the signature of one Frank Davidson to a certain cheque purporting to be a cheque drawn by

the aforesaid Frank Davidson in favour of the aforesaid Henry Thompson upon the English and Foreign Bank for the sum of one hundred pounds with intent thereby then to defraud the aforesaid English and Foreign Bank and the aforesaid Frank Davidson ; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

And the jurors aforesaid upon their oath aforesaid do further present that upon the day and year aforesaid the aforesaid Henry Thompson feloniously did offer, utter, dispose of and put off to the aforesaid English and Foreign Bank a certain cheque, to wit the cheque described in the first count of this indictment with intent thereby then to defraud the aforesaid English and Foreign Bank and the aforesaid Frank Davidson and well knowing the signature to the aforesaid cheque to be forged ; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

10. *Fraudulent Conversion under* 1 *Edw. VII. c.* 10, *s.* 1, *sub-s.* 1 (*a*).

Central Criminal Court, to wit. } The jurors for our Lord the King upon their oath present that Jane Watson on the first day of December in the year of Our Lord one thousand nine hundred and four in the parish of Stepney in the county of London having received of and from one Christopher Jamieson certain property, to wit the sum of five pounds in money, for and on the account of one Harriet Stevenson unlawfully did fraudulently apply the said property or part thereof to her own use and benefit ; against the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

11. *Fraudulent Conversion under* 1 *Edw. VII. c.* 10, *s.* 1, *sub-s.* 1 (*b*).

Central Criminal Court, to wit. } The jurors for our Lord the King upon their oath present that Jane Watson on the first day of December in the year of Our Lord one thousand nine hundred and four in the parish of Stepney in the county of London having been entrusted by one Christopher Jamieson with certain property to wit the sum of five shillings in money in order that she the said Jane Watson might apply the said property to a certain purpose, to wit in order that she might purchase for the said Christopher Jamieson one knife, unlawfully and fraudulently did apply the said property or part thereof to her own use and benefit ; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

12. *Grievous Bodily Harm with Intent.*

County of Cornwall, to wit. } The jurors for our Lord the King upon their oath present that Jack Ayres on the first day of June in the year of Our Lord one thousand nine hundred and nine one Tom Lee feloniously, unlawfully and maliciously did wound with intent in so doing him, the said Tom Lee, thereby then to

maim ; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

*Second Count.*—And the jurors aforesaid upon their oath aforesaid do further present that the said Jack Ayres afterwards, to wit on the day and year aforesaid, one Tom Lee feloniously, unlawfully and maliciously did wound, with intent in so doing him, the said Tom Lee, thereby then to disfigure ; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

[Other counts may be added charging an intent to disable, to do grievous bodily harm, to prevent lawful apprehension, &c.]

### 13. *Larceny and Receiving.*

Borough of Plymouth, to wit. } The jurors for our Lord the King upon their oath present that John Smith on the first day of November in the year of Our Lord one thousand nine hundred and four one gold watch and chain of the goods and chattels of James Robinson feloniously did steal, take and carry away ; against the peace of our Lord the King, his Crown and dignity.

*Second Count.*—And the jurors aforesaid upon their oath aforesaid do further present that the said John Smith afterwards, to wit on the day and year aforesaid, the chattels aforesaid before then feloniously stolen, taken and carried away as aforesaid feloniously did receive and have, he the said John Smith then well knowing the said chattels to have been feloniously stolen, taken and carried away ; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

### 14. *Larceny by a Bailee.*

Central Criminal Court, to wit. } The jurors for our Lord the King upon their oath present that William Johnson on the fifth day of May in the year of Our Lord one thousand nine hundred and five being then entrusted by one Percival Jordan with certain goods of the said Percival Jordan, to wit one gold chain, did feloniously steal, take and carry away the same ; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

### *Libel.*

For precedents of informations and indictments for libel, see "Odgers on Libel and Slander," 4th ed., 744—757.

### 15. *Malicious Damage.*

Borough of Plymouth, to wit. } The jurors for our Lord the King upon their oath present that Charles James Cox on the twenty-ninth day of April in the year of Our Lord one thousand nine hundred and eight in and upon certain real property of a private nature, to wit a pane of plate glass of the value of a sum

exceeding five pounds and of the property of Louisa Arliss, unlawfully and maliciously did commit certain damage, injury and spoil to an amount exceeding five pounds by unlawfully and maliciously breaking and destroying the same; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

16. *Murder.*

County of Somerset, to wit. } The jurors for our Lord the King upon their oath present that William Thompson on the third day of November in the year of Our Lord one thousand nine hundred and four feloniously, wilfully and of his malice aforethought did kill and murder one Frederick Willis; against the peace of our Lord the King, his Crown and dignity.

17. *Neglect of Children by an Habitual Drunkard.*

Borough of Portsmouth, to wit. } The jurors for our Lord the King upon their oath present that Charlotte East, then being a person over the age of sixteen years having the custody of Frances Mary East, a child under the age of sixteen years, to wit of the age of fifteen years, on divers dates between the twenty-second day of June and the twenty-sixth day of November in the year of Our Lord one thousand nine hundred and seven unlawfully and wilfully did neglect the said child in a manner likely to cause such child unnecessary suffering; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

*Second Count.*—And the jurors aforesaid upon their oath aforesaid do further present that the said Charlotte East, then being a person over the age of sixteen years as aforesaid having the custody of the said Frances Mary East, a child under the age of sixteen years, to wit of the age of fifteen years, on divers dates between the said twenty-second day of June and the said twenty-sixth day of November in the year aforesaid unlawfully and wilfully did neglect the said child in a manner likely to cause such child injury to her health; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

*Third Count.*—And the jurors aforesaid upon their oath aforesaid do further present that the said Charlotte East was a habitual drunkard within the meaning of the first section of the Inebriates Act, 1898.

18. *Perjury.*

Central Criminal Court, to wit. } The jurors for our Lord the King upon their oath present that heretofore and before the commission of the offence by Arthur Brown hereinafter mentioned, to wit on the tenth day of August in the year of Our Lord one thousand nine hundred and one, one Charles Danvers commenced an action in the King's Bench Division of the High Court of Justice

against one Edward Fisher in which action he, the said Charles Danvers, alleged that the said Edward Fisher had wrongfully given him into custody and caused him to be apprehended on a charge of felony, for which apprehension and arrest he the said Charles Danvers claimed damages from the said Edward Fisher. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, at the sittings at Nisi Prius, holden at the Royal Courts of Justice, in the county of Middlesex, on the thirteenth day of July in the year of Our Lord one thousand nine hundred and two, the said action came on to be tried and was tried in due form of law by a special jury of the said county, before the Honourable Sir Charles John Darling, Knight, one of His Majesty's Judges of the said High Court. And that at and upon the trial of the said action the said Arthur Brown appeared to be examined as a witness upon oath for and on behalf of the said Charles Danvers, the plaintiff in the said action, and was in due form of law sworn as a witness in the said action and did take his corporal oath upon the Holy Gospel of God before the said Judge that the evidence which he should then give to the Court and jury as such witness touching the matters then in question between the said parties should be the truth, the whole truth, and nothing but the truth. And it became and then was a material question and subject of enquiry in the said action whether the said Edward Fisher, the defendant in the said action, had given the said Charles Danvers into custody or caused him to be apprehended on a charge of felony or at all. And the jurors aforesaid, upon their oath aforesaid, do further present that the said Arthur Brown, being so sworn as aforesaid, wickedly intending to pervert the due course of justice, and to cause it falsely to appear to the said Court and jury that the said Edward Fisher did command or authorise the said apprehension and arrest of the said Charles Danvers, did then and there upon the said thirteenth day of July in the year of Our Lord one thousand nine hundred and two during the trial of the said action before the said Judge and jury and within the jurisdiction of the Central Criminal Court, unlawfully, falsely, knowingly, wilfully, corruptly, and maliciously, say, depose, swear, and give evidence, amongst other things in substance and to the effect following: that is to say, "I (meaning the said Arthur Brown) was present in the house of Edward Fisher. I heard him give Charles Danvers into the custody of a police officer upon a charge of felony. He said 'This man has broken open my desk and robbed me of a sum of thirty pounds.'" Whereas in truth and in fact the said Arthur Brown was not present in the house of the said Edward Fisher at any time, and the said Edward Fisher never gave the said Charles Danvers into the custody of any police officer or of any one else upon a charge of felony or any other charge, or spoke the said words or any other words to the effect deposed to by the said Arthur Brown; as he the said Arthur Brown well knew at the time he so said, deposed, swore, and gave evidence as aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Arthur Brown in manner and form aforesaid unlawfully and falsely did commit wilful and corrupt perjury in contempt of our Lord the King; to

the evil example of all others in the like case offending, and against the peace of our Lord the King, his Crown and dignity.

19. *Receiving Goods obtained by False Pretences.*[1]

County of Suffolk, to wit. } The jurors for our Lord the King upon their oath present that Moses Goldstein on the fourth day of June in the year of Our Lord one thousand nine hundred and eight one silver watch of the goods and chattels of Andrew Nicholas, then lately before unlawfully, knowingly and designedly obtained from the said Andrew Nicholas by false pretences, unlawfully did receive and have, he the said Moses Goldstein at the time when he so received the said silver watch as aforesaid then well knowing the same to have been unlawfully, knowingly and designedly obtained from the said Andrew Nicholas by false pretences; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

20. *Robbery with Violence.*

Central Criminal Court, to wit. } The jurors for our Lord the King upon their oath present that Joseph Brown on the first day of June in the year of Our Lord one thousand nine hundred and nine in the parish of Lambeth in the county of London upon John Smith feloniously did make an assault, and the said John Smith in corporal fear and danger of his life then and there feloniously did put, and one watch and chain and the sum of two shillings in money of the goods, chattels and monies of the said John Smith from the person and against the will of the said John Smith then and there violently and feloniously did rob, steal, take and carry away, and that the said Joseph Brown immediately before, at the time of, and immediately after the robbery aforesaid feloniously did beat, strike and use other personal violence to the said John Smith; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

21. *Treason.*

R. *v.* Lynch.[2]

The County of the County of London and the County of Middlesex, to wit. } The jurors for our Lord the King upon their oath present that upon the eighteenth day of January in the sixty-third year of the reign of our late Lady Queen Victoria and long before and continually from thence until the death of our said late Lady Queen Victoria an open and public war was prosecuted and carried on by the Government of the South African Republic and the burghers and men of the said South African Republic under the said Government against our said

[1] For an indictment for receiving stolen property, knowing it to have been stolen, see No. 13.

[2] [1903] 1 K. B. 444.

late Lady Queen Victoria and her subjects the said Government and the said burghers and men then being enemies of our said late Lady Queen Victoria And that Arthur Alfred Lynch otherwise called Arthur Lynch, then being a subject of our said late Lady Queen Victoria and well knowing the premises aforesaid but not regarding the duty of his allegiance nor having the fear of God in his heart and being moved and seduced by the instigation of the Devil as a false traitor against our said late Lady Queen Victoria and wholly withdrawing the allegiance fidelity and obedience which every true and faithful subject of our said late Lady Queen Victoria should and of right ought to have borne towards our said late Lady Queen Victoria and contriving and with all his strength intending to aid and assist the said enemies of our said late Lady Queen Victoria against our said late Lady Queen Victoria and her subjects, heretofore during the said war, to wit on the said eighteenth day of January in the year aforesaid, at Pretoria in the territory of the said South African Republic in parts beyond the seas without this realm of England and at divers other times both before and after that day as well at Pretoria as elsewhere within the territory of the said South African Republic with force and arms unlawfully maliciously and traitorously was adhering to, aiding and comforting the said Government of the said South African Republic and the said burghers and men of the said South African Republic under the said Government against our said late Lady Queen Victoria and her subjects the said Government and the said burghers and men then being enemies of our said late Lady Queen Victoria And that in the prosecution performance and execution of his treason and traitorous adhering aforesaid he the said Arthur Alfred Lynch otherwise called Arthur Lynch as such false traitor as aforesaid during the said war to wit on the said eighteenth day of January in the year aforesaid at Pretoria aforesaid within the territory of the said South African Republic in parts beyond the seas without this realm of England with force and arms maliciously and traitorously did voluntarily make a certain declaration in the Dutch language and did then and there write sign and subscribe his signature, to wit the words Arthur Lynch, to the words of the said declaration then being in and upon a certain document in the Dutch language partly printed and partly written which said last-mentioned words were and are according to the tenor following that is to say: "Ik onder-
"geteekende Arthur Alfred Lynch tot heden Ierlander (Britsch Ond.)
"geboren te Australie inwoner van de Zuid-Afrikaansche Republiek sedert
"5 dagen verklaar hiermede gewillig te zijn om de wapenen voor deze
"Republiek op te vatten om de onafhankelijkheid, die thans bedreigd
"wordt of in de toekomst bedreigd mocht worden, te handhaven en te
"verdedigen en verlang alzoo de Eed van trouw af te leggen als Vol Burger
"der Zuid-Afrikaansche Republiek. Geteekend te Pretoria op den 18°
"Januari 00" which said words in the Dutch language above-mentioned and set forth being translated into the English language were and are of the same signification and meaning as these English words following, that is to say: "I, the undersigned Arthur Alfred Lynch, up to the present an
"Irishman (British subject), born at Australia, inhabitant of the South

"African Republic since five days hereby declare my willingness to take "up arms for this Republic in order to maintain and defend its independ- "ence, which now is, or in the future may be threatened, and therefore "desire to take the Oath of allegiance as a full Burgher of the South "African Republic. Signed at Pretoria on the 18th day of January 1900," and did then and there deliver and cause to be delivered the said declaration and document to the said Government of the said South African Republic, the said declaration and document being so made delivered and caused to be delivered as aforesaid by him the said Arthur Alfred Lynch otherwise called Arthur Lynch with intent and in order that he might become a full burgher of the said South African Republic and might enter into the military service of the Government of the said South African Republic and join himself to divers burghers and men under the said Government in the prosecution and carrying on of the said war against our said late Lady Queen Victoria and her subjects the said Government and the said burghers and men then being enemies of our said late Lady Queen Victoria And that in further prosecution performance and execution of his treason and traitorous adhering aforesaid he the said Arthur Alfred Lynch otherwise called Arthur Lynch as such false traitor as aforesaid during the said war, to wit on the said eighteenth day of January in the year aforesaid, at Pretoria aforesaid within the territory of the said South African Republic in parts beyond the seas without this realm of England with force and arms maliciously and traitorously did voluntarily take and enter into a certain oath or solemn promise in the Dutch language and did then and there write sign and subscribe his signature, to wit the words Arthur Lynch, to the words of the said oath or solemn promise then being in and upon a certain document in the Dutch language partly printed and partly written which said last mentioned words were and are according to the tenor following, that is to say: "Eed. Ik Arthur Alfred Lynch tot "heden Ierlander (Britsch Onderdaan) geboren Australie verlangend vol "stemgerechtigd burger der Zuid-Afrikaansche Republiek te worden "ingevolge besluit van den Edel Achtbaren Eersten Volksraad, Artikel "1442, dato 29th September 1899, zweer (of verklaar plechtig dat het "afleggen van een eed naar mijne geloofsovertuiging niet geoorloofd is en "beloof plechtig) in alle oprechtheid, dat ik dezen Staat getrouw zal zijn, "zijne onafhankelijkheid zal eebiedigen en ondersteunen, mij aan de "Grondwet en andere wetten en de wettige autoriteiten des lands zal "onderwerpen en mij in alle opzichten zal gedragen zooals het een getrouwen "burger van den Staat betaamt. Zoo waarlijk helpe mij God Almachtig! "(of Dat beloof ik plechtig!)" which said words in the Dutch language above-mentioned and set forth being translated into the English language were and are of the same signification and meaning as these English words following that is to say: "Oath. I Arthur Alfred Lynch up to the "present an Irishman (British subject) born in Australia desiring to become "a fully enfranchised burgher of the South African Republic in terms of "Hon. First Volksraad's Resolution, Art. 1442, dated 29th September, "1899, swear (or solemnly declare that the taking of an oath is not allowed

"by my creed and solemnly promise) in all sincerity, that I will be faithful "to this State" (meaning the South African Republic) "will respect and "support its independence, will submit to the 'Grond Wet' and other laws "and lawful authorities of the country," (meaning the said South African Republic) "and will in every way conduct myself as becomes a faithful "burgher of the State" (meaning the said South African Republic) "So "truly help me God Almighty (or that I promise solemnly)," and did then and there communicate and deliver and cause to be communicated and delivered the said oath or solemn promise and document to the said Government of the said South African Republic, the said oath or solemn promise and document being so taken communicated and delivered and caused to be communicated and delivered as aforesaid by him the said Arthur Alfred Lynch otherwise called Arthur Lynch with intent and in order that he might become a fully enfranchised burgher of the said South African Republic and might enter into the military service of the Government of the said South African Republic and join himself to divers burghers and men under the said Government in the prosecution and carrying on of the said war against our said late Lady Queen Victoria and her subjects the said Government and the said burghers and men then being enemies of our said late Lady Queen Victoria And that in further prosecution performance and execution of his treason and traitorous adhering aforesaid he the said Arthur Alfred Lynch otherwise called Arthur Lynch as such false traitor as aforesaid during the said war, to wit on the tenth day of February in the year aforesaid, at Pretoria aforesaid within the territory of the said South African Republic in parts beyond the seas without this realm of England with force and arms maliciously and traitorously did voluntarily take a certain oath in the Dutch language and did then and there write sign and subscribe his signature to wit the words Arthur Lynch to the words of the said oath then being in and upon a certain document in the Dutch language partly printed and partly written which said last-mentioned words were and are according to the tenor following, that is to say: (*Here the document is set out*) which said words in the Dutch language above mentioned and set forth being translated into the English language were and are of the same signification and meaning as these English words following, that is to say: (*Here the translation is set out*) and did then and there communicate and deliver and cause to be communicated and delivered the said oath and document to the said Government of the said South African Republic the said oath and document being so taken communicated and delivered and caused to be communicated and delivered as aforesaid by him the said Arthur Alfred Lynch otherwise called Arthur Lynch with intent and in order that he might serve in the capacity of an officer in the military service of the Government of the said South African Republic and join himself to divers burghers and men under the said Government in the prosecution and carrying on of the said war against our said late Lady Queen Victoria and her subjects the said Government and the said burghers and men then being enemies of our said late Lady Queen Victoria And that in further prosecution performance

and execution of his treason and traitorous adhering aforesaid he the said Arthur Alfred Lynch otherwise called Arthur Lynch as such false traitor as aforesaid during the said war, to wit on the said tenth day of February in the year aforesaid, at Pretoria aforesaid within the territory of the said South African Republic in parts beyond the seas without this realm of England with force and arms maliciously and traitorously did voluntarily take a certain oath and did then and there write sign and subscribe his signature to wit the words Arthur Lynch to the words of the said oath then being in and upon a certain document in the Dutch language partly printed and partly written which said last-mentioned words were and are according to the tenor following that is to say: (*Here the document is set out*) which said words in the Dutch language above mentioned and set forth being translated into the English language were and are of the same signification and meaning as these English words following that is to say: (*Here the translation is set out*) and did then and there communicate and deliver and cause to be communicated and delivered the said oath and document to the said Government of the said South African Republic, the said oath and document being so taken communicated and delivered and caused to be communicated and delivered as aforesaid by him the said Arthur Alfred Lynch otherwise called Arthur Lynch with intent and in order that he might serve in the capacity of Special Justice of the Peace of a certain corps known as the Irish Corps and might command the said corps in the military service of the Government of the said South African Republic and thereby aid and assist the said Government in the prosecution and carrying on of the said war against our said late Lady Queen Victoria and her subjects the said Government and the burghers and men under the said Government then being enemies of our said late Lady Queen Victoria And that in further prosecution performance and execution of his treason and traitorous adhering aforesaid he the said Arthur Alfred Lynch otherwise called Arthur Lynch as such false traitor as aforesaid during the said war, to wit on the first day of March in the year aforesaid, at and within the territory of the said South African Republic in parts beyond the seas without the realm of England with force and arms maliciously and traitorously did depart and go from Pretoria aforesaid with intent and in order in a certain part of the dominions of our said late Lady Queen Victoria to wit in the Klip River District of the British Colony of Natal together with divers burghers and men under the Government of the said South African Republic to levy wage and make war against our said late Lady Queen Victoria and her subjects, the said Government and the said burghers and men then being enemies of our said late Lady Queen Victoria and the said burghers and men then and there assembled in the said Klip River District of the said British Colony in arms against our said late Lady Queen Victoria and her subjects And that in further prosecution performance and execution of his treason and traitorous adhering aforesaid he the said Arthur Alfred Lynch otherwise called Arthur Lynch as such false traitor as aforesaid during the said war, to wit on the twenty-second day of March in the year aforesaid, at Johannes-

burg in the territory of the said South African Republic in parts beyond the seas without this realm of England with force and arms maliciously and traitorously did publish in a certain newspaper called The Standard and Diggers' News and cause and procure to be published in the said newspaper a certain document purporting to be an appeal to Irishmen which said document was and is according to the tenor following, that is to say : "To "Irishmen. The events of the war are daily becoming more critical and "important. We Irish burghers of the two Republics are fighting not "only for the country but for liberty, honour, and all that men hold dear. "The time has come for all to be up and doing. Irishmen and men of "Irish descent have never been backward when battle has sounded its "clarion call ; and never has the need been greater or the opportunity "more glorious for the display of Irish chivalry. Irishmen, rally to the "Green Flag ! Make your strength greater in unity, and the part of "Ireland in this war more disastrous to your enemies and more inspiriting "to your friends. Never since Fontenoy have Irishmen been so blessed "by fortune. Remember how that name has resounded in Irish history. "Remember that Irishmen who fall in this war will be joined in Irish "memories forever with Sarsfield, with Wolfe Tone, and with Robert "Emmet. Remember that all Ireland and all Irish America are looking "at your actions, and that your valour has already sent the electric thrill "of enthusiasm throughout the ranks 'of the Sea-divided Gael' and "raised the prestige of the Irish name. Communicate with M. F. Hogan, "care of H. S. Lombaard, Field Cornet of Johannesburg, or direct to me. "Arthur Lynch (Colonel : Irish Brigade II.), by Krugersdorp Laager, "near Glencoe." With intent then and there as such false traitor as aforesaid maliciously and traitorously to solicit incite persuade and procure Irishmen and men of Irish descent to aid and assist the Government of the said South African Republic and the burghers and men of the said South African Republic under the said Government in the prosecution and carrying on of the said war against our said late Lady Queen Victoria and her subjects the said Government and the said burghers and men then being enemies of our said late Lady Queen Victoria And that in further prosecution performance and execution of his treason and traitorous adhering aforesaid he the said Arthur Alfred Lynch otherwise called Arthur Lynch as such false traitor as aforesaid during the said war, to wit on the eighteenth day of May in the year aforesaid, at Elandsfontein in the territory of the said South African Republic in parts beyond the seas without this realm of England and at divers other times both before and after that day as well at Elandsfontein as elsewhere, within the territory of the said South African Republic with force and arms maliciously and traitorously did command order and direct a certain armed body of men called the Second Irish Brigade with intent that the said Second Irish Brigade under his command orders and direction as aforesaid should aid assist and co-operate with divers armed burghers and men under the Government of the said South African Republic in levying prosecuting and carrying on the said war against our said late Lady Queen Victoria and her subjects the

said Government and the said burghers and men then being enemies of our said late Lady Queen Victoria And that in further prosecution performance and execution of his treason and traitorous adhering aforesaid he the said Arthur Alfred Lynch otherwise called Arthur Lynch as such false traitor as aforesaid during the said war, to wit on the twentieth day of May in the year aforesaid, at Vereeniging in the territory of the said South African Republic in parts beyond the seas without this realm of England with force and arms maliciously and traitorously did aid assist and advise one Schoeman, the said Schoeman then being a Commandant of divers burghers and men under the Government of the said South African Republic and the said Government the said Schoeman and the said burghers and men then being enemies of our said late Lady Queen Victoria, in an inquiry and investigation then and there holden in the course of and for the purpose of the prosecution of the said war by and before the said Schoeman as such Commandant as aforesaid as to the conduct and presence at Vereeniging aforesaid of certain persons to wit one George Alexander Gregg, one Joseph Houlder, and one Arthur Worthington the said persons having theretofore been arrested at Vereeniging aforesaid and brought before the said Schoeman as such Commandant as aforesaid on suspicion of being then and there engaged in aiding and assisting the subjects of our said late Lady Queen Victoria in the said war by procuring for and giving to the said subjects intelligence and information relating to the movements and dispositions of the military forces of the Government of the said South African Republic the said Government then being enemies of our said late Lady Queen Victoria And that in further prosecution performance and execution of his treason and traitorous adhering aforesaid he the said Arthur Alfred Lynch otherwise called Arthur Lynch as such false traitor as aforesaid during the said war, to wit on the twenty-fourth day of May in the year aforesaid, at Johannesburg in the territory of the said South African Republic in parts beyond the seas without this realm of England and at divers other times both before and after that day as well at Johannesburg as elsewhere within the territory of the said South African Republic with force and arms maliciously and traitorously did solicit incite encourage and endeavour to persuade one François Alwyn Viljoen and divers other persons whose names are to the jurors aforesaid unknown to prosecute and carry on the said war against our said late Lady Queen Victoria and her subjects And that in further prosecution performance and execution of his treason and traitorous adhering aforesaid he the said Arthur Alfred Lynch otherwise called Arthur Lynch as such false traitor as aforesaid during the said war, to wit on the said twenty-fourth day of May in the year aforesaid, at Johannesburg aforesaid in the territory of the said South African Republic in parts beyond the seas without this realm of England and at divers other times both before and after that day at Johannesburg aforesaid with force and arms maliciously and traitorously was procuring and attempting to procure for the military service of the Government of the said South African Republic divers horses harness and wagons with intent to aid and assist

the said Government and the burghers and men under the said Government in the prosecution and carrying on of the said war against our said late Lady Queen Victoria and her subjects the said Government and the said burghers and men then being enemies of our said late Lady Queen Victoria And that in further prosecution performance and execution of his treason and traitorous adhering aforesaid he the said Arthur Alfred Lynch otherwise called Arthur Lynch as such false traitor as aforesaid during the said war, to wit on the eighteenth day of January in the year aforesaid, at Johannesburg in the territory of the said South African Republic in parts beyond the seas without the realm of England and at divers other times both before and after that day as well at Johannesburg as elsewhere within the territory of the said South African Republic with force and arms maliciously and traitorously did consult consent and agree with one Mitchell and with one Lukas Meyer and with divers other persons whose names are to the jurors aforesaid unknown then and there to levy wage and make war against our said late Lady Queen Victoria and her subjects In contempt of our said late Lady Queen Victoria and her laws to the evil example of all others in the like case offending contrary to the duty of the allegiance of him the said Arthur Alfred Lynch otherwise called Arthur Lynch : against the form of the statute in such case made and provided and against the peace of our said late Lady Queen Victoria her Crown and dignity.

*Second Count.*—Adhering to, aiding and comforting the Government of the South African Republic and the burghers and men of the said South African Republic under the said Government, enemies of the late Queen.

*Overt acts in Natal.*

1. Commanding 2nd Irish Brigade in Natal.
2. Composing and sending for publication address to Irishmen (Exhibit 11).
3. Fighting at Sundays River.
4. Consulting with enemies to levy war against the late Queen in Natal.

*Third Count.*—Adhering to the Government of the Orange Free State and the burghers and men of the said Orange Free State under the said Government, enemies of the late Queen.

*Overt acts in South African Republic* with intent to assist the Government of the South African Republic and the burghers and men of the South African Republic under the said last-mentioned Government, allies of the said enemies of the late Queen.

As in Count 1 (*mutatis mutandis*).

*Fourth Count.*—Adhering to the Government of the Orange Free State and the burghers and men of the Orange Free State under the said Government, enemies of the late Queen.

*Overt acts in Natal* with intent to assist the Government of the South African Republic and the burghers and men of the South African Republic

under the said last-mentioned Government, allies of the said enemies of the late Queen.

As in Count 2 (*mutatis mutandis*).

22. *Unlawful Wounding.*

Borough of Plymouth, to wit. } The jurors for our Lord the King upon their oath present that William Dunstable on the twenty-fifth day of June in the year of Our Lord one thousand nine hundred and nine one Henry Martin unlawfully and maliciously did wound ; against the form of statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

*Second Count.*—And the jurors aforesaid upon their oath aforesaid do further present that the said William Dunstable on the said twenty-fifth day of June in the year aforesaid did inflict grievous bodily harm upon the said Henry Martin ; against the form of the statute in such case made and provided, and against the peace of our Lord the King, his Crown and dignity.

23. *Unlawful Assembly.*

County of Devon, to wit. } The jurors for our Lord the King upon their oath present that William Brewer, John Stewer, Peter Gurney, Peter Davey, Henry Hawke, Daniel Whidden, and Thomas Cobley, Esquire, together with divers other evil-disposed persons to the number of fourteen or more to the jurors aforesaid unknown, on the first day of April in the year of Our Lord one thousand eight hundred being then armed with whips, sticks and other offensive weapons at the parish of Widdecombe in the county of Devon, unlawfully did assemble and gather together to disturb the peace of our said Lord the King ; and being so assembled and gathered together, armed as aforesaid, did then and there unlawfully make a great noise and disturbance, and did then and there remain and continue armed as aforesaid making such noise and disturbance for the space of two hours and more then next following, to the great disturbance and terror not only of the liege subjects of our said Lord the King there being and residing, but of all other the liege subjects of our said Lord the King then passing and repassing along the King's common highway there ; in contempt of our said Lord the King and his laws, to the evil example of all others in the like case offending, and against the peace of our Lord the King, his Crown and dignity.

# RULES

## UNDER THE POOR PRISONERS' DEFENCE ACT, 1903.

(3 Edw. VII. c. 38.)

[The following Rules have been made by the Attorney-General in pursuance of section 2 of the Act with the approval of the Lord Chancellor and the Home Secretary.]

1. Every clerk of assize and clerk of the peace shall keep a list of solicitors who are willing to undertake the defence of poor prisoners, and shall insert in such list the names of all solicitors who are willing so to act. The name of any solicitor shall be removed from the list, either on the application of the solicitor himself or by direction of any judge of assize or chairman of quarter sessions. A copy of such list shall be sent to every clerk to justices in the county or quarter sessions district.

2. Every clerk of assize and clerk of the peace shall keep a list of the members of the Bar attending the circuit or sessions who are willing to act as counsel for poor prisoners, and shall insert in such list the names of all such members of the Bar who are willing so to act.

[3. . . .]

4. Any justices, judge of assize, or chairman of quarter sessions, who give a certificate [in pursuance of section 1 of the Act] shall at the same time assign to the prisoner from the list kept under rule 1 a solicitor to whose services the prisoner shall be entitled.

A copy of the depositions shall be furnished to the solicitor so assigned by the justices' clerk, clerk of assize, or clerk of the peace, as the case may be.

5. Any member of the Bar whose name appears upon the list kept under rule 2 may be instructed on behalf of the prisoner by the solicitor so assigned.

[The following regulations as to costs have been made by the Secretary of State, under section 1 (2) of the Act.]

1. There may be allowed to the solicitor a fee not exceeding 2*l.* 2*s.* 0*d.*, provided that the presiding judge, after the conclusion of the trial, may, if he think fit, certify that the case was one of exceptional length or difficulty, and thereupon the fee may be increased to such sum as he may direct, but not in any case exceeding 5*l.*

In addition to such fee the solicitor may be allowed travelling expenses actually and necessarily incurred by himself and his clerk on the scale applicable to the travelling expenses of ordinary witnesses for a prosecution.

2. There may be allowed to counsel a fee of 1*l.* 3*s.* 6*d.*; provided that the presiding judge after the conclusion of the trial, may, if he think fit, certify that the case was one of exceptional length or difficulty, and thereupon the fee may be increased to such sum as he may direct, but not in any case exceeding 3*l.* 5*s.* 6*d.*

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